Supreme Court, U.S.
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(1)

No. 03-1364

In The
Supreme Court of the United States

BRUCE J. GERMAN,
Petitioner,
v.
THERM-O-DISC, INC., AND OLD REPUBLIC INSURANCE COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Ohio

PETITION FOR A WRIT OF CERTIORARI
with Appendix

*ROBERT W. KERPSACK
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215

614-242-1000

Attorney for Petitioner
**Counsel of Record*

March, 2004

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

QUESTIONS PRESENTED

1. Whether a state court of last resort violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by summarily extinguishing existing rights of action created by a clear past precedent.

2. Whether a state court of last resort violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by retroactively applying a new rule of law to litigants who relied upon the existence of a right of action created by a clear past precedent.

3. Whether a state court of last resort violates the Due Process Clause of the Fourteenth Amendments to the United States Constitution by *sua sponte* reversing a civil judgment, without first affording the parties reasonable notice and an opportunity to be heard.

4. Whether the decision of the Ohio Supreme Court in Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, conflicts with the stare decisis test adopted by this Court in Lawrence v. Texas, 539 U.S. ___, 123 S.Ct. 2472, 2482-2483 (2003).

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Bruce J. German, Petitioner

Therm-O-Disc, Inc., Respondent
Old Republic Insurance Company, Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce J. German respectfully prays that a writ of certiorari be issued to review the judgments of the Supreme Court of Ohio in the present case. In plain contravention of the requirements of the Constitution of the United States and of the federal common law pronounced by this Court, the Ohio Supreme Court has embarked on an *ad hoc*, standardless, and lawless exercise of judicial power, which appears designed to extinguish property rights of Ohio citizens, including Petitioner, and to thwart the stability and predictability of the state's legal system. Because the property rights of Petitioner and other Ohio residents similarly situated are governed directly by the Constitution, the Court's decision in the present case involves issues of the utmost federal importance.

STATEMENT OF JURISDICTION

The two Entries of the Ohio Supreme Court filed on November 5, 2003, reversing the judgments of the court of appeals, appear as Appendix H to this Petition. Motions for Reconsideration were filed on November 17, 2003 (Appendix K), and both were denied pursuant to the Entries filed by the Ohio Supreme Court on December 24, 2003 (Appendix L).

The jurisdiction of the Court in the present action is invoked pursuant to 28 U.S.C. § 1257, which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of

> certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The present action involves final judgments of the Ohio Supreme Court extinguishing rights of the Petitioner that are claimed under the United States Constitution. Substantial federal questions are crucial to the decision in the instant action.

CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. The Trial Court and Intermediate Appellate Court Proceedings

This action arises from catastrophic injuries suffered by Petitioner, Bruce J. German (hereinafter "German"), in a motor vehicle collision caused by a drunk driver on January 9, 1997. On June 23, 1999, the Ohio Supreme Court issued its decision in Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St. 3d 660, 710 N.E.2d 1116, holding that the standard Ohio Uninsured Motorist Coverage Endorsement attached to most commercial automobile insurance policies issued in Ohio insures employees of a corporate named insured, regardless of whether the employees are injured within the scope of employment. Shortly after the the Scott-Pontzer decision was released, German attempted to obtain

the insurance policies maintained by his employer, Respondent, Therm-O-Disc, Inc. (hereinafter "Therm-O-Disc"); however, his requests for such information were largely ignored. Accordingly, on February 28, 2000, German filed his Complaint in the Court of Common Pleas for Richland County, Ohio, seeking discovery of the automobile liability insurers of Therm-O-Disc. A number of months later, Therm-O-Disc responded to German's discovery requests, and, on August 9, 2000, German filed his First Amended Complaint, adding the liability insurer, Respondent, Old Republic Insurance Company (hereinafter "Old Republic"), as a party defendant.

The parties filed cross-motions for summary judgment on the issue of whether two Old Republic policies provide underinsured motorist coverage for German's damages at issue. On February 27, 2001, the trial court filed its Judgment Entry granting German's motions for summary judgment. On April 9, 2001, a jury trial was commenced to determine the value of German's underinsured motorist claims. On April 12, 2001, after a four-day jury trial, a verdict was returned in favor of German and against Old Republic in the amount of $1,490,023.00. On June 15, 2001, the trial court filed its Final Judgment Entry, reversing its prior Entry of summary judgment in favor of German, finding that the Old Republic policies at issue provided underinsured motorist coverage with a deductible amount of $2 million.

On January 28, 2001, German filed his timely Notice of Appeal to the Fifth District Court of Appeals of Ohio. Old Republic and Therm-O-Disc cross-appealed. On March 28, 2002, the court of appeals filed its Opinion and Judgment Entry (Appendix A) reversing the trial court's judgment and

holding that the trial court erred in finding that German's underinsured motorist claims are subject any of the restrictions applicable to the bodily injury liability coverage provided under the policies, including prompt notice provisions, subrogation/consent to settle provisions, and coverage deductible amounts. On April 24, 2002, the court of appeals granted the motion of Old Republic and Therm-O-Disc to certify a conflict to the Ohio Supreme Court (Appendix B).

II. The Ohio Supreme Court Proceedings

On May 13, 2002, Therm-O-Disc and Old Republic filed their Notice of Appeal and Memorandum in Support of Jurisdiction to the Ohio Supreme Court.

On September 4, 2002, the Ohio Supreme Court filed its separate Entries (Appendix C and Appendix D) allowing the certified conflict and the discretionary appeal on the following Propositions of Law:

> 1. The requirements of prompt notice of claims and preservation of the insurer's subrogation rights are conditions precedent to coverage, including UM/UIM coverage implied by operation of law; and
>
> 2. The policy deductible applies to coverage imposed by law, since the deductible is a fundamental provision of the policy, not an exclusion applicable only to the liability coverage of the policy.

In its September 4, 2002, Entries, the Ohio Supreme Court also ordered the present action stayed pending a

decision in Luckenbill v. Hamilton Mut. Ins. Co., Ohio Supreme Court Case No. 2001-1807.

On October 4, 2002, the Ohio Supreme Court filed its Entries (Appendix E) stating that Luckenbill v. Hamilton Mut. Ins. Co. had been dismissed; however, the present action was ordered stayed for a decision in Ferrando v. Auto-Owners Ins. Co., Ohio Supreme Court Case No. 2001-1843. On December 27, 2002, the Ohio Supreme Court issued its decision in Ferrando v. Auto-Owners Ins. Co., 98 Ohio St.3d 186, 2002-Ohio-7217. Also on December 27, 2002, the Ohio Supreme Court filed its Entries in the present action ordering that the action be held for a decision in Burkhart v. CNA Ins. Co., Ohio Supreme Court Case Number 02-0579 (Appendix F).

On March 5, 2003, Therm-O-Disc and Old Republic filed a Motion to Dissolve/Lift Stay of Briefing. On March 17, 2003, German filed his Memorandum Opposing the Motion to Dissolve/Lift Stay of Briefing and his Motion to Dismiss the present discretionary appeal. On April 23, 2003, the Ohio Supreme Court filed its Entries denying the parties' motions (Appendix G).

III. The *Sua Sponte* Reversal By The Ohio Supreme Court

The present action remained dormant in the Ohio Supreme Court until November 5, 2003, when the Court filed its one-page Entries (Appendix H) summarily reversing the judgment of the court of appeals on the authority of Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849 (Appendix

I), which was issued on the same date, overruling/limiting the four-year-old Scott-Pontzer precedent. The November 5, 2003, Entries filed in the present case were German's first notice that his rights were before the Court in Galatis. In this regard, the legal issues in the present action were in no way even remotely similar to the issues ordered by the Ohio Supreme Court to be briefed in Galatis:

> "Whether the inclusion of a 'Broadened Coverage Endorsement,' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein?"

The present action was included with approximately 110 other civil actions pending before the Ohio Supreme Court, which were also summarily decided on the authority of Galatis. See In Re Uninsured & Underinsured Motorist Coverage Cases, 100 Ohio St.3d 302, 2003-Ohio-5888 (Appendix J).

On November 17, 2003, German filed his Motions for Reconsideration (Appendix K). On December 24, 2003, however, the Ohio Supreme Court filed its Reconsideration Entry denying German's motions for reconsideration (Appendix L).

REASONS FOR GRANTING THE PETITION

I. Review Of This Case Is Warranted Because The Ohio Supreme Court Disregarded Federal Law In Extinguishing German's Property Rights

In Angle v. Chicago, St. Paul, M. & D. Ry., 151 U.S. 1 (1894), this Court held that an existing right of action to recover damages for an injury is property that is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. At the time German presented his underinsured motorist claims to Old Republic in the present case, he possessed a substantive property right, created by Scott-Pontzer v. Liberty Mut. Fire Ins.Co., to recover benefits under the un/underinsured coverage provided by the Old Republic insurance policies issued to his employer, Therm-O-Disc. German possessed such substantive rights of action, regardless of whether he was injured in the scope and course of his employment. German's substantive property right to un/underinsured motorist coverage benefits conflicts, however, with the subsequent Galatis decision, which required that an employee be injured in the scope and course of employment in order to be insured under the un/underinsured motorist coverage of an employer's automobile liability insurance policies. Regardless of whether Scott-Pontzer or Galatis was rightly or wrongly decided, the Ohio Supreme Court summarily extinguished German's underinsured motorist claims, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Ohio Supreme Court's judgments raise substantial federal questions of the utmost importance. Accordingly, this Court should grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

In asserting his underinsured motorist claims in the present case, German relied upon Ohio's Uninsured Motorist Statute and upon the most recent interpretation of that statute by the Ohio Supreme Court in Scott-Pontzer. When German presented his underinsured motorist claims to Old Republic, no court of binding precedent in Ohio had ever ruled that Scott-Pontzer was wrongly decided or should be limited in any way. However, nearly three years after German's Complaint was filed in the instant action, Galatis was announced by the Ohio Supreme Court, requiring that employees be within the scope and course of their employment in order to be insured under their corporate employer's un/underinsured motorist coverage. The Fourteenth Amendment to the United States Constitution prohibits, however, the application of Galatis to those un/underinsured motorist claims already accrued when the Galatis decision was released on November 5, 2003. By applying Galatis to the present case, the Ohio Supreme Court extinguished the "Scott-Pontzer" claims of German, who had justifiably relied upon the validity of Scott-Pontzer. Extinguishing his underinsured motorist claims violates German's constitutional right to due process of the law, which is guaranteed to him, as a citizen, by the Fourteenth Amendment of the United States Constitution. Accordingly, the Ohio Supreme Court erred, to the substantial detriment of German's substantive due process rights, in summarily extinguishing German's underinsured motorist claims. This Court should, therefore, grant German's Petition for a Writ of

Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

II. Review Of This Case Is Warranted Because The Ohio Supreme Court Disregarded Federal Law In Retroactively Applying A New Rule Of Law To German's Claims Created By A Clear Past Precedent

German respectfully submits that the Supreme Court of Ohio violated his substantive due process rights by retroactively applying Galatis to his underinsured motorist claims. In Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), this Court recognized that a judicial decision should not be applied retroactively if it establishes a new principle of law, if such a limitation would avoid substantial inequitable results, and if retrospective application would not retard the purpose and effect of the new rule. In James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), a sharply divided Court held that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect to all others not barred by *res judicata* or statutes of limitation; and that the theory of selective prospectivity must be abandoned in civil cases. Three of the Beam justices dissented, staunchly defending the practices of both pure and selective prospective application of decisions and the continued viability of the Chevron Oil test. Id. at 549 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., dissenting). In Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), the Court limited Chevron Oil insofar as the case permitted selective prospective-only application of a new rule of law. Justice O'Connor, joined by the Chief Justice, dissented from the Harper majority's rejection of the

use of prospective retroactivity under the Chevron Oil test, and expressed concern that a statement in the majority opinion "intimates that pure prospectivity may be prohibited as well." Id. at 115 (O'Connor, J., joined by Rehnquist, C.J., dissenting). Justices Kennedy and White, concurred in part, disagreeing with that aspect of the Harper majority opinion and expressing their continuing view that pure prospectivity will be appropriate sometimes in the civil context. id. at 110 (Kennedy, J., joined by White, J., concurring in part and concurring in the judgment).

In Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995), this Court held that, under Harper. its decision in Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988), must be applied retroactively to plaintiff Hyde's lawsuit filed in 1987 arising out of a 1984 vehicular accident, and that the Supremacy Clause of the Federal Constitution bars Ohio from applying its tolling statute to pre-Bendix torts and thus requires reversal of the Ohio Supreme Court's refusal to apply Bendix retroactively. Bendix did not, however, announce a new rule of law "either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Chevron Oil, at 106. As the Court was explicit to acknowledge in Bendix, it was "[a]pplying well-settled constitutional principles. Bendix, at 889, not a new legal theory or one that had not been foreshadowed by other precedents.

In Galatis, the Ohio Supreme Court announced a new rule of law relating to the interpretation of the Ohio Uninsured Motorist Coverage Endorsement form, which was incorporated into most of the commercial auto insurance

policies issued in Ohio between 1997 and 1999. Overruling the clear past precedent of Scott-Pontzer, upon which many uninsured motorist claimants relied, the Galatis Court held that an employee must be acting within the scope and course of employment in order to be insured under un/underinsured motorist coverage provided under a corporate employer's policy. Remarkably, the "scope and course of employment" holding in Galatis is predicated upon no express language within the applicable Westfield policy. The Galatis majority merely infers this to have been the intent of the contracting parties. As Justice Resnick points out in her dissenting opinion in Galatis, the parties never even raised in the lower courts any arguments challenging the rationale underlying Scott-Pontzer. Galatis, at ¶ 72 (Resnick, J., dissenting). In fact, the Galatis case came to the Ohio Supreme Court as a certified conflict by the court of appeals on the following issue: "Whether the inclusion of a 'Broadened Coverage Endorsement,' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein." Indeed, the Galatis holding came "out of the blue," Beam (O'Connor, J. dissenting), and represents "an avulsive change which caused the current of the law thereafter to flow between new banks," Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499 (1968). As such, Galatis is precisely the type of case law which this Court has repeatedly declared should *not* be applied retroactively. *Chevron Oil, supra, Beam, supra, Reynoldsville Casket, supra.*

In retroactively applying Galatis to his underinsured motorist claims, the Supreme Court of Ohio violated German's substantive due process rights. The Ohio Supreme Court erred, therefore, in summarily extinguishing German's

underinsured motorist claims. Accordingly, this Court should grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

III. Review Of This Case Is Warranted Because The Ohio Supreme Court Disregarded Federal Law In Summarily Reversing A Judgment Without Affording The Parties With Notice And An Opportunity To Be Heard

German respectfully submits that the Ohio Supreme Court's summary extinguishment of his underinsured motorist claims and the court's *sua sponte* retroactive application of Galatis to the pending appeal relating to his claims violates his procedural due process rights. This Court has held that procedural due process protects "* * * those fundamental principles of liberty and justice which lie at the base of our civil and political institutions * * *," Hurtado v. California (1884), 110 U.S. 516, 535, and to guarantee those procedures which are required for the "* * * protection of ultimate decency in a civilized society," Adamson v. California (1947), 332 U.S. 46, 61 (Frankfurter, J., concurring). Procedural due process places upon the government the duty to give reasonable notice, and an opportunity to be heard, to those whose interests in life, liberty or property are adversely affected by governmental action. Tribe, American Constitutional Law (2 Ed. 1988) 683, Section 10-8.

In addition to the substantive property rights of his underinsured motorist claims, German also had a property interest in the appeal of his case pending before the Ohio Supreme Court. As such, German is entitled to procedural

due process, which requires that he receive notice that his rights are before the court and be afforded an opportunity to be heard on the merits of his case. In the present case, however, German received no notice whatsoever that the issues in his case were before the Ohio Supreme Court in Galatis or that his case would be decided on the authority of the holding in Galatis. Indeed, when the Galatis decision was released on November 5, 2004, briefing in German was ordered stayed by the Ohio Supreme Court, pending a decision in Burkhart v. CNA Ins. Co., not Galatis. Moreover, German had no reason to even suspect that he was an interested party in Galatis. In fact, the allowed Propositions of Law in the German appeal were in no way even remotely similar to the issues ordered briefed in the Galatis certified conflict. The Ohio Supreme Court had ordered the Galatis parties to brief only the following issue:

> "Whether the inclusion of a 'Broadened Coverage Endorsement,' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein?"

In the German appeal, however, the Ohio Supreme Court allowed only the following Propositions of Law:

> 1. The requirements of prompt notice of claims and preservation of the insurer's subrogation rights are conditions precedent to coverage, including UM/UIM coverage implied by operation of law; and
>
> 2. The policy deductible applies to coverage imposed by law, since the deductible is a fundamental

provision of the policy, not an exclusion applicable only to the liability coverage of the policy.

Unlike the policy at issue in Galatis, the Old Republic policies at issue in the present case do not even contain a broadened coverage endorsement. In fact, at no time during the proceedings below in the present case had Old Republic and Therm-O-Disc even raised the issue of the validity of Scott-Pontzer, upon which German's underinsured motorist claims were based. Indeed, the only issues in the German appeal were whether the underinsured motorist coverage provided to German by operation of the Ohio Uninsured Motorist Statute is subject to the same policy conditions relating to the bodily injury liability coverage under the Old Republic policies (i.e. prompt notice, subrogation/consent to settle, and coverage deductible amounts). As such, German had no notice or reasonable expectation that his rights may be before the Ohio Supreme Court in Galatis. At a minimum, German possessed a due process right to receive notice from the court either that his rights were before the court in Galatis or that his case was going to be decided on the authority of Galatis unless good cause could be shown. Without such notice, however, German was denied an opportunity to be heard either on the merits of his case or on the merits of Galatis. With no such opportunity to be heard, German was denied his constitutionally-protected right of procedural due process of law.

By *sua sponte* reversing the judgment of the court of appeals, without giving German any notice that his rights were before the court and without affording German any opportunity to be heard on the merits of his case, the Supreme Court of Ohio violated German's procedural due process

rights. The Ohio Supreme Court erred, therefore, in summarily reversing the judgment of the court of appeals in the present case. Accordingly, this Court should grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

IV. Review Of This Case Is Warranted Because The Judgment Of The Ohio Supreme Court Conflicts With This Court's Adopted *Stare Decisis* Test

In Lawrence v. Texas, 539 U.S. ___, 123 S.Ct. 2472, 2482-2483 (2003), this Court adopted a trifold *stare decisis* test for overruling a past clear precedent. The test is synthesized in Justice Scalia's dissenting opinion in Lawrence: "Today's approach to stare decisis invites us to overrule an erroneously decided precedent (including an "intensely divisive" decision) if: (1) its foundations have been 'eroded' by subsequent decisions, ante at ___; (2) it has been subject to 'substantial and continuing' criticism, ibid.; and (3) it has not induced 'individual or societal reliance' that counsels against overturning, ante at ___." (Scalia, J., dissenting). In Galatis, the Ohio Supreme Court holds that a prior decision of the court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. The Galatis majority states in a footnote that Lawrence was issued subsequent to the initial drafting of the Galatis decision; however, the result-oriented holding in Galatis simply cannot be squared with the *stare decisis* test adopted by this Court in Lawrence. Simply

stated, the Galatis *stare decisis* test is a less stringent standard than the *stare decisis* test adopted by this Court in Lawrence.

German respectfully submits that Galatis fails the first and second prongs of the Lawrence *stare decisis* test. In this regard, the foundation of the Scott-Pontzer decision, which created German's underinsured motorist claims, had never been eroded by any subsequent decisions by Ohio courts of binding precedent. In fact, the Galatis majority cites only a couple of trial court decisions that were critical of Scott-Pontzer. German respectfully submits that the primary criticism of Scott-Pontzer came from a rather boisterous insurance lobby, which possessed a significant financial interest in not having to pay the claims created by Scott-Pontzer. German respectfully submits that the Galatis holding and the holding in present case are sad illustrations of how the politics of judicial elections can adversely affect the substantive common law of a state and the stability and predictability of the state's legal system. When Scott-Pontzer was decided by the Ohio Supreme Court on June 23, 1999, the decision was highly touted in some political circles as an example of "judicial activism." As Justice Pfeifer notes in his dissenting opinion in Galatis, these same political circles applauded the three sitting justices in the Galatis majority as practitioners of "judicial restraint." See Galatis, at ¶¶ 100 and 101 (Pfeifer, J., dissenting). Simply stated, neither the Galatis case nor the present case are appropriate vehicles for the Galatis majority to accomplish its goals of overruling the four-year-old precedent of Scott-Pontzer. id. at ¶ 74, (Robie Resnick, J. dissenting).

German also respectfully submits that Galatis fails the third prong of the Lawrence *stare decisis* test. Regardless of

whether Scott-Pontzer was rightly or wrongly decided, many Ohio un/underinsured motorist claimants, including German, relied upon the validity of Scott-Pontzer in prosecuting their claims arising from crashes outside the scope of employment. Pursuant to the Lawrence *stare decisis* test, these claimants certainly do not rely to their detriment upon the validity of Scott-Pontzer.

In reliance upon the Scott-Pontzer decision, German retained legal counsel and filed the present civil action against his employer, Therm-O-Disc, Inc., seeking discovery of the motor vehicle liability insurance policies maintained by the employer. In reliance upon the Scott-Pontzer decision, Therm-O-Disc and its insurer, Old Republic Insurance Company, retained legal counsel and produced to German copies of the requested insurance policies. In reliance upon the Scott-Pontzer decision, German sought declaratory judgment in the present action that the Old Republic insurance policies at issue provide un/underinsured motorist coverage for his damages arising from a crash with a drunk driver on January 9, 1997, in which German was catastrophically injured. In reliance upon the Scott-Pontzer decision, Therm-O-Disc and Old Republic conceded in the lower courts that German was an insured under the policies in question, but defended the declaratory judgment action, contending that German failed to comply with general policy conditions of prompt notice and protection of subrogation/ consent to settle. In reliance upon the Scott-Pontzer decision, the parties filed cross-motions for summary judgment. In reliance upon the Scott-Pontzer decision, the trial court granted summary judgment in favor of German and denied the motion for summary judgment of Therm-O-Disc and Old Republic. In reliance upon the Scott-Pontzer decision, the

trial court convened a four-day jury trial on the issue of damages. In reliance upon the Scott-Pontzer decision, the jury returned a verdict in favor of German and against Old Republic in the amount of $1,490,023.00. In reliance upon the Scott-Pontzer decision, the trial court entered final judgment in favor of Old Republic, finding that the un/underinsured motorist coverage provided under the Old Republic policies by operation of the Ohio Uninsured Motorist Statute is subject to the same $2 million deductible amount that is attributable to the policies' bodily injury liability coverage. In reliance upon the Scott-Pontzer decision, the parties in the present case filed cross-notices of appeal to the Fifth District Court of Appeals of Ohio. In reliance upon the Scott-Pontzer decision, the parties briefed and argued to the court of appeals their assignments of error. In reliance upon the Scott-Pontzer decision, the court of appeals reversed the judgment of the trial court. In reliance upon the Scott-Pontzer decision, the court of appeals certified a conflict to the Ohio Supreme Court. In reliance upon the Scott-Pontzer decision, Therm-O-Disc and Old Republic filed a notice of discretionary appeal to the Ohio Supreme Court. In reliance upon the Scott-Pontzer decision, German expended approximately $15,000.00, exclusive of attorney fees, in prosecuting his underinsured motorist claims at issue.

Clearly, the parties, the jury, and the lower courts in the present case all expended significant time, money, and resources in reliance upon the Scott-Pontzer decision. Indeed, the validity of Scott-Pontzer was never even an issue in dispute in the present case. It cannot be disputed, therefore, that the Galatis overruling/limiting of Scott-Pontzer creates an undue hardship for those who have relied upon it in the present case. Contrary to this Court's decision in Lawrence,

however, the Galatis holding and its application to the present case fails the *stare decisis* tested adopted by this Court for overruling a clear past precedent. In fact, in overruling/limiting Scott-Pontzer, the Galatis majority only loosely applies the conflicting *stare decisis* test being adopted by the Ohio Supreme Court in Galatis. On its face, the Galatis *stare decisis* test serves only as a remedial tool to change the substantive law of Ohio to suit the political will of the majority of the justices sitting on the Ohio Supreme Court. Allowed to stand, the Galatis *stare decisis* test and the application of the Galatis to the present case results in uncertainty and unpredictability of Ohio's legal system. Accordingly, Galatis was wrongly decided, and the application of Galatis to the underinsured motorist claims at issue in the present case violates German's due process rights. This Court should, therefore, grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of the State of Ohio should be granted.

Respectfully submitted.

ROBERT W. KERPSACK CO., LPA
ROBERT W. KERPSACK
Attorney for Petitioner, Bruce J. German
21 East State Street, Suite 300
Columbus, OH 43215

Telephone: (614) 242-1000

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BRUCE J. GERMAN,	**: JUDGES: THE HON.**
Plaintiff-Appellant/	**: Wm. B. Hoffman, P.J.**
Cross-Appellee	**: W. Scott Gwin, J.**
-vs-	**: Julie A. Edwards, J.**
	:
THERM-O-DISC, INC.; et al.	**: Case No. 01CA512**
Defendant-Appellees/	**:**
Cross-Appellants	**: OPINION**

Character of Proceedings:	Appeal from the Richland County Court of Common Pleas Case No. 00-174-H
Judgment:	Reversed and Remanded
Date of Judgment Entry:	March 28, 2002

Appearances:	
For Appellant/ Cross-Appellee	For Appellees/ Cross-Appellants
ROBERT W. KERPSACK 21 E. State Street, Ste 300 Columbus, Ohio 43215	M. NEAL RAINS 925 Euclid Ave. Ste 1100 Cleveland, Ohio 44115

Hoffman, P.J.

{¶1} Plaintiff-appellant/cross-appellee Bruce J. German ("German") appeals the June 15, 2001 Final Judgment Entry of the Richland County Court of Common Pleas, which granted judgment in favor of defendants-appellees/cross-appellants Therm-O-Disc, Inc., et al. upon a finding German was not entitled to UM/UIM coverage under two policies of insurance issued to defendant-appellee/cross-appellant Therm-O-Disc, Inc. by defendant-appellee/cross-appellant Old Republic Insurance Company.[1] Therm-O-Disc and Old Republic cross-appeal from the trial court's February 27, 2001 and April 6, 2001 Judgment Entries.

STATEMENT OF THE FACTS AND CASE

{¶2} On January 9, 1997, German was riding as a passenger in a van owned and operated by his friend, Jerry Beaver, when an oncoming vehicle driven by Christopher Wray traveled left of center and struck the Beaver van. Minutes later, an automobile driven by Bradley Kentosh collided into the rear end of the van. German subsequently filed an action against Wray and his wife; Kentosh; Allstate Insurance Co.; Beaver's insurer, State Farm Insurance Co.; German's homeowner insurer; B.J. Woods, Inc., a beverage store which provided alcohol to Wray; and Kostadian Bulakovski, who also provided alcohol to Wray. German

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[1]Defendants Emerson Electric Company Benefit Plan and National Union Fire Insurance Company are not parties to this appeal.

settled his claims with the Wrays' insurer, Kentosh's insurer, B.J. Woods, Inc.'s insurer, and Allstate Insurance Co. German signed various documents, including a release of all claims, to confirm the settlements. Neither Therm-O-Disc nor Old Republic were notified of the accident, injuries, claims, or settlements.

{¶3} German filed a Complaint for Discovery in Richland County Court of Common Pleas, seeking to discover the liability insurers of Therm-O-Disc. German was employed by Therm-O-Disc at the time of the accident. After obtaining the necessary discovery German filed his first amended complaint seeking a declaratory judgment against Old Republic. Old Republic issued two policies of insurance to Emerson Electric Co: a commercial general liability insurance policy and a business automobile insurance policy. Therm-O-Disc, which is a subsidiary of Emerson Electric, is a named insured under both policies.

{¶4} German filed a motion for partial summary judgment on January 18, 2001, seeking a declaration he was entitled to underinsured motorist coverage under the Old Republic commercial general liability insurance policy (Policy No. ZW54126). Old Republic filed a brief in opposition and cross-motion for summary judgment relative to both policies. In turn, German filed a reply memorandum in support of his motion for summary judgment and cross-motion for summary judgment on the business automobile insurance policy (Policy No.

TB17201). The parties filed a number of motions in support of and in opposition to the respective claims. Via Judgment Entry filed February 27, 2001, the trial court granted German's motions for summary judgment on both policies, and denied Old Republic's motions.

{¶5} Old Republic filed an Application for Ruling Prior to Trial on Defense of Constitutional Violations, requesting the trial court dismiss German's complaint because implied uninsured or under-insured motorist coverage violates the Ohio and United States Constitutions. German filed a motion contra and motion to strike. Via Judgment Entry filed April 6, 2001, the trial court granted German's motion to strike and denied Old Republic's application for dismissal of the complaint.

{¶6} The matter proceeded to jury trial on April 9, 2001. After hearing all the evidence and deliberations, the jury returned a verdict in favor of German in the amount of $1,409,023. German filed a motion for prejudgment interest, attorney fees, and court costs. On May 15, 2001, Old Republic filed a brief regarding post-trial rulings on pending issues of law for determination by the court, arguing as a matter law, the judgment for German should be $0 because both policies included $2,000,000 deductibles.

After both parties briefed the issue, the trial court entered final judgment in favor of Old Republic. The trial court memorialized its ruling via Final Judgment Entry filed June 15, 2001.

{¶7} It is from this judgment entry German appeals, raising the following assignments of error:

> {¶8} "I. The trial court erred to the prejudice of appellant/cross-appellee, bruce german, in entering final judgment in favor of appellee/cross-appellant, old republic insurance company, on mr. german's asserted under-insured motorist claim against old republic commercial general liability policy number zy54126.
>
> {¶9} "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT/CROSS-APPELLEE, BRUCE GERMAN, IN ENTERING FINAL JUDGMENT IN FAVOR OF APPELLEE/ CROSS-APPELLANT, OLD REPUBLIC INSURANCE COMPANY, ON MR. GERMAN'S ASSERTED UNDER-INSURED MOTORIST CLAIM AGAINST OLD REPUBLIC BUSINESS AUTO POLICY NUMBER TB 17201.

{¶10} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN DENYING APPELLANT'S MOTION FOR PRE-JUDGMENT INTEREST, ATTORNEY FEES, AND COURT COSTS, AND FAILING TO CONDUCT AN EVIDENTIARY HEARING."

{¶11} Old Republic filed a conditional cross-appeal of the trial court's pretrial rulings of February 27, 2001, and April 6, 2001, raising the following assignments of error:

{¶12} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS FEBRUARY 27, 2001 JUDGMENT ENTRY WHICH GRANTED PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT AND DENIED OLD REPUBLIC'S MOTIONS FOR SUMMARY JUDGMENT.

{¶13} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS APRIL 6, 2001 JUDGMENT ENTRY WHICH DENIED OLD REPUBLIC'S APPLICATION FOR DISMISSAL ON CONSTITUTIONAL GROUNDS AND GRANTED PLAINTIFF'S MOTION TO STRIKE OLD REPUBLIC'S CONSTITUTIONAL DEFENSE.

Appeal
I

{¶14} In his first assignment of error, German maintains the trial court erred in entering final judgment in favor of Old Republic and Therm-O-Disc on German's claim he is entitled to underinsured motorist coverage under the commercial general liability policy no. ZY54126. German sets forth four arguments in support of his position. We shall address each in turn.

A. Old Republic Commercial General Liability Policy No. ZY 54126 Provides Underinsured Motorist Coverage by Operation of Law in the Amount of $6,000,000 Each Occurrence.

{¶15} German contends the Old Republic commercial general liability policy is a motor vehicle liability policy, and Old Republic was required to offer UIM coverage to its named insureds pursuant to R.C. 3937.18. German submits because Old Republic failed to offer such coverage, the coverage arises by operation of law.

{¶16} R.C. 3937.18 requires an insurer to offer UM/UIM coverage whenever an automobile liability insurance policy is issued in the State of Ohio. If such coverage is not offered, the coverage is provided to the

insured by operation of law.[2]

{¶17} Initially, we must determined whether Old Republic was required to offer UM/UIM coverage under the commercial general liability policy. For this determination, we turn to the language of the contract itself, which provides:

{¶18} "SECTION I - COVERAGES

{¶19} "COVERAGE

A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY

{¶20} "1. Insuring Agreement.

{¶21} "a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

We may at our discretion investigate any occurrence" and settle any claim or "suit" that may result."

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[2] *Abate v. Pioneer Mut. Cas. Co.* (1970), 22 Ohio St.2d 161, para. 1 and 2 of syllabus.

{¶22} The policy excludes coverage for "'[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use, or entrustment to others of any * * * 'auto' * * * owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'[3] The policy also contains these exceptions to the exclusions:

"This exclusion does not apply to:

{¶23} "(1) A watercraft while ashore on premises you own or rent;

{¶24} "(2) A watercraft you do not own that is:

{¶25} "(a) Less than 26 feet long; and

{¶26} "(b) Not being used to carry persons or property for a charge;

{¶27} "(3) Parking an 'auto' on, or on the ways next to premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

{¶28} "(4) Liability assumed under any 'insured

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[3]Commercial General Liability Coverage Form, Section I - Coverage A - 2g.

contract' for the ownership; maintenance or use of aircraft or watercraft; or

{¶29} "(5) 'Bodily injury' or 'property damage' arising our of the operation of any of the equipment listed in paragraph f.(2) or f.(3) of the definition of 'mobile equipment' " (Section V.8).

{¶30} In *Selander v. Erie Ins. Group*,[4] the Ohio Supreme Court held where motor vehicle liability coverage is provided, even in limited form, uninsured/underinsured coverage must also be provided.[5]

{¶31} Because the Old Republic commercial general liability policy provides motor vehicle liability coverage, albeit in limited circumstances, we find the policy qualifies as an automobile liability or motor vehicle liability policy under R.C. 3937.18, and Old Republic was required to offer UM/UIM coverage. Having failed to do so, we find the coverage arises by operation of law.

{¶32} The next issue for our determination is whether German is an insured under the UIM coverage.

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[4]*Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541, 546. (Citation omitted.)

[5]*Id.* at 546. (Citations omitted).

Because Therm-O-Disc is designated in the declarations page of the commercial general liability policy, it necessarily follows the corporation would be an insured for UIM purposes. While UIM protection is afforded to the corporation, the corporation cannot suffer bodily injury. As the Supreme Court in *Scott-Pontzer* stated, "it would be nonsensical to limit protection solely to the corporate entity * * * naming the corporation as the insured is meaningless unless coverage extends to some person or persons - including to the corporation's employees."[6] Although the liability portion of the commercial general liability policy limits coverage to an employee within the scope of employment, such limitation is not applicable to UIM coverage which arises by operation of law. The language restricting insurance coverage for employees applies solely to the liability coverage, and such limitation does not extend to UIM coverage.[7]

{¶33} Futhermore, because German, as an employee of Therm-O-Disc, is an insured under the commercial general liability policy, albeit only when within the scope of his employment, it is unnecessary to determine whether any ambiguity exists as to the identity of the insureds where UM/UIM coverage arises by operation of law.

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[6]*Id.* at 664.

[7]*Id.* at 666 (Citation omitted).

B. The Underinsured Motorist Coverage Provided by Old Republic Commercial General Liability Policy No. ZY 54126 by Operation of Law is Not Subject to Any Deductible Amounts.

{¶34} In the instant action, Old Republic asserts Therm-O-Disc is self-insured for the first $2,000,000 of liability arising from occurrences covered under the Old Republic commercial general liability policy. The trial court agreed, finding Therm-O-Disc to be self insured with respect to German's claim; therefore, exempt from the statutory requirements of R.C. 3937.18. The trial court concluded, "because R.C. 3937.18 does not apply, there are no implied UIM coverages or [German's] injuries."[8]

{¶35} Initially, we note an analysis of whether Therm-O-Disc is a self insurer is irrelevant to the outcome of this assignment of error. Assuming, *arguendo*, Therm-O-Disc is a self-insurer "in a practical sense," such status would only apply up to the first $2,000,000 of liability, for which Therm-O-Disc would be responsible pursuant to the deductible. Any liability beyond $2,000,000 up to $6,000,000 would be covered under the Old Republic policy. Accordingly, we find Therm-O-Disc's status as a self insurer "in a practical sense" for a portion of the coverage does not excuse Old Republic from offering UIM

[8]June 15, 2001 Final Judgment Entry at 4.

coverage up to $6,000,000. Old Republic was obligated to offer $6,000,000 in UIM coverage even though the amount was subject to a $2,000,000 deductible. Having failed to do so, UIM coverage arises by operation of law

{¶36} We now must determine whether the deductible provision in the commercial general liability policy applies to UIM coverage arising by operation of law. In *Scott-Pontzer*, the Ohio Supreme Court determined "any language in the Liberty Mutual Umbrella Policy restricting insurance coverage was intended to apply solely to excess *liability coverage* and not for purposes of underinsured motorist coverage" when such coverage arises by operation of law.[9] Based upon the rational set forth in *Scott-Pontzer*, we find the deductible provision at issue herein is a restriction on the commercial general liability coverage only, and does not extend to UIM coverage arising by operation of law. Accordingly, we find the UIM coverage is not subject to any deductible amount.

C. Old Republic Received Timely Notice of the Mr. German's Underinsured Motorist Claim against the Commercial General Liability Policy.

[9]*Scott-Pontzer, supra* at 666. (Citation omitted).

{¶37} In light of this Court's decision in *Myers v. Safeco Ins. Co. of Am.*,[10] we find German is not barred from recovery for failing to notify Old Republic.

D. Old Republic's Constitutional Challenge of the Mandatory Offering of Un/underinsured Motorist Coverage under R.C. 3937.18 Lacks Merit.

{¶38} To the trial court and to this Court, Old Republic argues the trial court's failure to enforce the intent of the parties to the insurance contract deprived the parties of their constitutional right to due process of law. Specifically, Old Republic asserts binding the parties to UIM coverage by operation of law violates the parties' freedom of contract; therefore, R.C. 3937.18, as applied in the instant action, is unconstitutional.

{¶39} This Court has previously determined R.C. 3937.18 does not violate Article I, Section 16 of the Ohio Constitution.[11] This Court has also expressly found R.C. 3937.18 does not violate the equal protection clauses of the

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[10]*Myers v. Safeco Ins. Co. of Am.* (Feb. 18, 2000), Licking App. No. 99CA00083, unreported, reversed on other grounds (2001), 91 Ohio St.3d 333.

[11]*Kleinsmith v. Allstate Ins. Co.* (Dec. 22, 2000), Richland App. No. 00CA14-2, unreported.

Ohio and United Constitution.[12]

{¶40} As the Ohio Supreme Court stated in *Beagle v. Walden*[13] :

"R.C. 3937.18 results from legislative policymaking. Coverage in accordance with R.C. 3937.18 is not a common-law right. Any contractual right to coverage prescribed under R.C. 3937.18 does not, therefore, come within the protection of Section 16, Article I of the Ohio Constitution.* * * To the extent that the legislature may exercise its policymaking authority to alter the contractual relationship between insurer and insured to provide greater protection to the insured, it may also limit or remove those protections once given. * * *

> **{¶42}** "R.C. 3937.18 places a statutory obligation on all motor vehicle liability insurers to offer uninsured/underinsured motorist coverage. To this extent, the parties' freedom to contract is superseded in furtherance of important public policy concerns. In placing this obligation on insurers, the General Assembly dictates the terms of the mandatory offering of uninsured/underinsured motorist coverage. * * * Because the obligation to

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[12]*Haddad v. State Farm Mut. Auto. Ins. Co.* (2000), Stark App. No. 1999CA00262, unreported.

[13]*Beagle v. Walden* (1997), 78 Ohio St.3d 59.

offer uninsured/underinsured motorist coverage is rooted in public policy and imposed by the legislature, the legislature is free to delimit the obligation. By obligating all motor vehicle liability insurers in a like manner, the General Assembly does not grant special privileges or immunities."

{¶43} Because it is has been determined R.C. 3937.18 is not unconstitutional, any judicial action taken thereunder is, likewise, not unconstitutional.

{¶44} Based upon the foregoing, German's first assignment of error is sustained.

II

{¶45} In his second assignment of error, German asserts the trial court erred in entering final judgment in favor of Old Republic upon a finding German was not entitled to UIM coverage under the Old Republic business auto policy. German sets forth five assertions in support of his assignment of error. We shall address each in turn.

A. The Purported Offer/rejection of Underinsured Motorist Coverage under Old Republic Business Auto Policy No. Tb 17201 Is Invalid

{¶46} In *Linko v. Indemn. Ins. Co. of N. Am.*[14], the Ohio Supreme Court set forth the necessary language which must be included in an uninsured/underinsured motorist coverage rejection form in order to satisfy the offer requirement of R.C. 3937.18(C). The Court held in order to satisfy the offer requirement, the insurer must (1) inform the insured of the availability of uninsured/ underinsured motorist coverage, (2) set forth the premium for the coverage, (3) include a brief description of the coverage, and (4) expressly state the uninsured/ underinsured coverage limits in its offer.[15] In so holding, the Supreme Court relied upon *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*,[16] in which the Court held there can be no rejection pursuant to R.C. 3937.18(C) unless there is a written offer of uninsured motorist coverage from the insurer. The *Linko* Court, in discussing *Gyori*, stated:

{¶47} *"Gyori* stands for the proposition that we cannot know whether an insured has made an express, knowing rejection of UIM coverage unless there is a written offer and written rejection. It only follows that a valid rejection requires a meaningful offer, i.e., an offer that is an

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[14]*Linko v. Indemn. Ins. Co. of N. Am.* (2001), 90 Ohio St.3d 445.

[15]*Id.* at 447- 448.

[16]*Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565,

offer in substance and not just in name."[17]

{¶48} Emerson Electric signed a rejection of uninsured/underinsured motorist coverage, selection of lower limit of liability & rejection of uninsured motorist property damage coverage form, which reads:

> **{¶49}** "The Ohio Revised Code (Section 3937.18), amended, permits you the insured named in the policy, to reject the Uninsured Motorists/Underinsured Motorists Coverage or to select a limit for such coverage lower than the limit of Bodily Injury Coverage in the policy. Uninsured Motorists Coverage provides insurance for the protection of persons insured under the policy who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Underinsured Motorists Coverage provides insurance for protection against loss for bodily injury, sickness or disease, including death, where the limit of coverage available for

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[17] *Linko*, supra at 449.

payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured is less than the limit for the Uninsured Motorists Coverage under your policy at the time of the accident.

{¶50} "* * *

{¶51} "In accordance with the Ohio Revised Code (Section 3937.18), amended, and Ohio Code (Section 3937.181), the undersigned insured (and each of them)-

{¶52} "* * *

{¶53} "[x] agrees that the Uninsured Motorists/ Underinsured Motorists Coverage afforded in the policy is hereby deleted."

{¶54} The form satisfies the first and third prongs of the *Linko* test, however, it fails to set forth the premium for the coverage and fails to expressly state the coverage limits in the offer. Because the second and fourth prongs of *Linko* have not been satisfied, we find Old Republic failed to meet the mandatory offer requirements of R.C. 3937.18, and the rejection is not valid. We note, in its Brief to this Court, Old Republic reluctantly concedes the

offer requirement of R.C. 3837.18 was not satisfied, stating, "that offer and rejection properly complied with the spirit of R.C. 3837.18 as intended by the legislature."[18] *Linko* requires actual compliance, not spirited compliance.

B. Old Republic Business Auto Policy No. Tb 17201 Provides Underinsured Motorist Coverage by Operation of Law in the Amount of $6,000,000.00 Each Occurrence

{¶55} As discussed in subsection A, because the rejection of UIM coverage was invalid, UIM coverage arises by operation of law under the business auto policy. Accordingly, the UIM coverage available is the amount of coverage equivalent to the auto liability coverage afforded.[19] The business auto policy at issue herein provides liability coverage in the amount of $6,000,000 per occurrence; therefore, by operation of law the policy provides UIM coverage in the same amount.

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[18]Appellee's Brief in Opposition to Appeal in Support of Cross-Appeal at 37 (Emphasis added).

[19]*Abate v. Pioneer Mut. Cas. Co.* (1970), 22 Ohio St.2d 161.

C. The Underinsured Motorist Coverage Provided by Old Republic Business Auto Policy No. TB 17201 by Operation of Law is Not Subject to any Deductible Amounts

{¶56} For the reasons set forth in Assignment of Error I, Subsection B, we find German is not responsible for any deductible amounts.

D. Old Republic Received Timely Notice of the [sic] Mr. German's Underinsured Motorist Claim Against the Business Auto Policy No. Tb 17201

{¶57} Based upon the rational set forth in *Myers v. Safeco Ins. Co., supra,* we find German is not barred from recovery.

E. Old Republic's Constitutional Challenge of the Ohio Supreme Court's Decision in *Linko* Lacks Merit

{¶58} For the reason set forth in Assignment of Error I, Subsection D, we find Old Republic and Therm-O-Disc's constitutional challenge to be without merit.

{¶59} Based upon the foregoing, German's second assignment of error is sustained.

III

{¶60} In light of this Court's disposition of German's first and second assignments of error, we find his third assignment of error to be premature.

Cross-Appeal

I

{¶61} For the reasons we sustained German's first and second assignments of error, we overruled Old Republic's sole assignment of error on cross-appeal.

{¶62} The judgment of the Richland County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J.
Gwin, J. and
Edwards, J. Concur

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FILED

MAR 2 8 2002

PHILLIP E. SCOTT
CLERK

BRUCE J. GERMAN	:	
Plaintiff-Appellant/Cross-Appellee	:	
	:	JUDGMENT
-vs-	:	ENTRY
	:	
THERM-O-DISC, INC., ET AL.	:	CASE NO.
Defendant-Appellees/Cross-Appellees	:	01CA51-2

For the reasons stated in our accompanying Memorandum-Opinion, the judgement of the Richland County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with our opinion and the law. Costs assessed to Old Republic.

/s/ William B. Hoffman

/s/ W. Scott Gwin

/s/ Julie A. Edwards

JUDGES

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

APPEALS
COUNTY, OHIO
FILED
APR 2 4 2002
PHILLIP E. SCOTT
CLERK

BRUCE J. GERMAN	:	
Plaintiff-Appellant/Cross-Appellee	:	
	:	JUDGMENT
-vs-	:	ENTRY
	:	
THERM-O-DISC, INC., ET AL.	:	CASE NO.
Defendants-Appellees/Cross-Appellants	:	01-CA51-2

This matter came before this Court upon defendants-appellees/cross-appellants Therm-O-Disc, Inc. and Old Republic Insurance Co.'s motion to certify a conflict between our opinion and opinions issued by other courts of appeals.

Upon review, we find our opinion is in conflict with:

> *Luckenbill v. Midwestern Indemn. Co.* (2001), 143 Ohio App.3d501; *Ferrando v. Auto-Owners Ins. Co.* (Sept 4, 2001), Ashtabula App. No. 2000-A-0038, unreported; and *Green v. Cincinnati Ins. Co.* (Dec. 7, 2001), Huron App. No. H-01-018, unreported.

The motion to certify conflict is sustained.

Pursuant to App. R. 25(A), we certify the following issue of law to the Ohio Supreme Court for review and final resolution:

> Whether the terms and conditions, including notice, subrogation, and deductible provisions, contained in a Business Auto Policy or Commercial General Liability Policy, apply to UM/UIM coverage which arises by operation of law.

It is so ordered.

/s/ William B. Hoffman

/s/ W. Scott Gwin

/s/ Julie A. Edwards

JUDGES

The Supreme Court of Ohio

Bruce J. German,	:	Case No. 02-837
Appellee,	:	
v.	:	ENTRY
Therm-O-Disc, Inc., et al.,	:	
Appellants.	:	

FILED
SEP 04 2002
CLERK OF COURT
SUPREME COURT OF OHIO

This cause is pending before the Court on the certification of conflict by the Court of Appeals for Richland County. On review of the order certifying a conflict.

IT IS DETERMINED by the Court that a conflict exists.

IT IS ORDERED by the Court, sua sponte, that this cause be consolidated with Supreme Court Case No. 02-837, German v. Therm-O-Disc, Inc., and held for the decision in Supreme Court Case No. 01-1807, Lukenbill v. Hamilton Mut. Ins. Co.

The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Richland County.

IT IS FURTHER ORDERED that the briefing schedule be stayed.

(Richland County Court of Appeals; No. 01CA512)

/s/ Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

Bruce J. German,	:	Case No. 02-803
Appellee,	:	
v.	:	ENTRY
Therm-O-Disc, Inc., et al.,	:	
Appellants.	:	

FILED
SEP 04 2002
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Upon consideration of the jurisdictional memoranda filed in this case, the Court hereby allows the appeal on Propositions of Law Nos. I and II.

IT IS ORDERED by the Court, sua sponte, that this cause be consolidated with Supreme Court Case No. 02-837, German v. Therm-O-Disc, Inc., and held for the decision in Supreme Court Case No. 01-1807, Lukenbill v. Hamilton Mut. Ins. Co.

IT IS FURTHER ORDERED by the Court that the Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Richland County.

IT IS FURTHER ORDERED that the briefing schedule be stayed.

(Richland County Court of Appeals; No. 01CA512)

/s/ Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

Bruce J. German,	:	Case No. 02-803
Appellee,	:	
v.	:	ENTRY
Therm-O-Disc, Inc., et al.,	:	
Appellants.	:	

FILED
OCT 04 2002
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

This cause is pending before the Court upon the allowance of a discretionary appeal and claimed appeal of right. On September 4, 2002, this Court ordered, inter alia, that this cause be held for the decision in Case No. 01-1807, Luckenbill et al. v. Hamilton Mut. Ins. Co. Whereas, on September 24, 2002, this Court dismissed Case No. 01-1807.

IT IS ORDERED by the Court, sua sponte, that this cause be held for the decision in Case No. 01-1843, Ferrando v. Auto-Owners Mut. Ins. Co. et. al. The previous order staying briefing in this case remains in effect.

(Richland County Court of Appeals; No. 01CA512)

/s/ Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

Bruce J. German,	:	Case No. 02-803
Appellee,	:	
v.	:	ENTRY
Therm-O-Disc, Inc., et al.,	:	
Appellants.	:	

FILED
DEC 27 2002
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

This cause is pending before the Court upon the allowance of a discretionary appeal and claimed appeal of right.

IT IS ORDERED by the Court, sua sponte, that this cause be held for the decision in Case No. 02-0579, Burkhart v. CNA Ins. Co. The previous order staying briefing in this case remains in effect.

(Richland County Court of Appeals; No. 01CA512)

/s/ Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

Bruce J. German,	:	Case No. 02-803
Appellee,	:	
v.	:	ENTRY
Therm-O-Disc, Inc., et al.,	:	
Appellants.	:	

FILED
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SUPREME COURT OF OHIO

This cause is pending before the Court as an appeal from the Court of Appeals for Richland County. Upon consideration of appellants' motion to dissolve/lift stay of briefing and appellee's motion to dismiss case.

IT IS ORDERED by the Court, that the motions be, and hereby are, denied.

(Richland County Court of Appeals; No. 01CA512)

/s/ Thomas J. Moyer
Chief Justice

The Supreme Court of Ohio

Bruce J. German,	:	Case No. 02-803
Appellee,	:	
v.	:	JUDGMENT ENTRY
Therm-O-Disc, Inc., et al.,	:	APPEAL FROM THE
Appellants.	:	COURT OF APPEALS

FILED
NOV 05 2003
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

This cause, here on appeal from the Court of Appeals for Richland County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed on authority of Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d ___, 2003-Ohio___.

It is further ordered that the appellants recover from the appellee their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Richland County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Richland County for entry.

COSTS:

Docket Fee, $40.00, paid by Frantz Ward LLP.

(Richland County Court of Appeals; No. 01CA512)

I HEREBY CERTIFY that this document is a true and accurate copy of the entry of the Supreme Court of Ohio filed 11-5-03 in Supreme Court case number 02-803

In witness whereof I have hereunto subscribed my name and affixed the seal of the Supreme Court of Ohio on this 5th day of Nov, 2003.

MARCIA J. MENGEL, Clerk

by _____, Deputy

/s/ Thomas J. Moyer
Chief Justice

WESTFIELD INSURANCE COMPANY *v.* GALATIS ET AL., APPELLANTS; AETNA CASUALTY & SURETY COMPANY, APPELLEE.

[Cite as *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.]

Stare decisis — Prior decision of Supreme Court may be overruled, when — Automobile liability insurance — Uninsured/underinsured motorist coverage — Employer's commercial automobile liability policy covers loss sustained by employee only if the loss occurs within the course and scope of employment — Scott-Pontzer v. Liberty Mut. Fire Ins. Co., limited — Designation of "family members" of the named insured as other insureds does not extend insurance to a family member of an employee of a corporation — Ezawa v. Yasuda Fire & Marine Ins. Co. of Am., overruled.

(No. 2002-0932 — Submitted March 26, 2003 — Decided November 5, 2003.)

CERTIFIED by the Court of Appeals for Summit County, No. 20784, 2002-Ohio-1502.

SYLLABUS OF THE COURT

1. A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or

changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

2. Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment. (*King v. Nationwide Ins. Co.* [1988], 35 Ohio St.3d 208, 519 N.E.2d 1380, applied; *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* [1999], 85 Ohio St.3d 660, 710 N.E.2d 1116, limited.)

3. Where a policy of insurance designates a corporation as a named insured, the designation of "family members" of the named insured as other insureds does not extend insurance coverage to a family member of an employee of the corporation, unless that employee is also a named insured. (*Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* [1999], 86 Ohio St.3d 557, 715 N.E.2d 1142, overruled.)

O'CONNOR, J.

{¶1} Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

{¶2} Mindful of these principles, we now examine Ohio's law regarding whether uninsured and underinsured motorist insurance issued to a corporation may compensate an individual for a loss that was unrelated to the insured corporation. This examination results in the limitation of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, by restricting the application of uninsured and underinsured motorist coverage issued to a corporation to employees only while they are acting within the course and scope of their employment, unless otherwise specifically agreed. It also requires overruling *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142.

I

{¶3} Jason Galatis died on September 24, 1994, as a passenger in a vehicle negligently operated by Shawn Butler. Galatis's estate settled its claim against Butler for $75,000 and released him from liability on September 1, 1995. The estate next settled an underinsured motorist claim against Grange Insurance Company, Galatis's parents' insurer, on December 5, 1995.

{¶4} The matter was resurrected on May 8, 2000, when the estate presented claims under the business auto policy and the general liability portion of a commercial insurance policy that Westfield Insurance Company ("Westfield") had issued to Oliver Printing Company, the employer of Galatis's father and uncle.

{¶5} Aetna Casualty and Surety Company ("Aetna") was notified of claims arising from Galatis's death on August 15, 2000. The claims against Aetna were made under a master insurance policy issued to Quagliata's Restaurants, Inc., the employer of Galatis's mother. This policy was in effect at the time of the accident that caused Galatis's death. The estate asserted claims for coverage under the business auto and commercial general liability parts of the combined policy.

{¶6} The trial court ruled that both Westfield insurance policies and both parts of the Aetna policy provided underinsured motorist coverage to certain members of the Galatis family. However, the court also ruled that the estate had destroyed the insurers' subrogation rights and had failed to give prompt notice of the claims, resulting in loss of coverage under the policies.

{¶7} All parties appealed. Before the court of appeals issued its opinion, the estate settled with Westfield, removing it from the case. The court of appeals affirmed the judgment in favor of Aetna on the grounds that an endorsement that listed seven specific individuals as insureds precluded the kind of ambiguity found in *Scott-Pontzer* as to who is insured under the uninsured motorist endorsement to the policy.

{¶8} The case is before us as a certified conflict.

II

{¶9} An insurance policy is a contract. The freedom to contract and the attendant benefits and responsibilities of the parties to a contract are integral to the liberty of the citizenry, so much so that the United States Constitution specifically protects against state encroachment

upon contracts. Clause 1, Section 10, Article I, United States Constitution.[1] In order to protect the integrity of contracts, the United States Constitution gives the United States Supreme Court the authority to overrule a state supreme court's interpretation of a state statute that infringes upon the right to contract. *Piqua Branch of State Bank of Ohio v. Knoop* (1853), 57 U.S. (16 How.) 369, 14 L.Ed. 977. In *Piqua*, the United States Supreme Court found our interpretation of a bank charter unconstitutional. It wrote, "We have power only to deal with contracts under the tenth section of the first article of the Constitution, whether made by a State or an individual; if such contract be impaired by an act of the State such act is void, as the power is prohibited to the State." Id. at 391, 14 L.Ed. 977.

{¶10} The Ohio Constitution also protects the freedom of contract. "The general assembly shall have no power to pass * * * laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intentions of parties * * * by curing omissions, defects, and errors, in instruments * * *, arising out of their

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1. "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

want of conformity with the laws of this state." Section 28, Article II, Ohio Constitution. The Ohio constitutional protection of contracts is coextensive with that of the federal Constitution. See *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 76, 697 N.E.2d 644.

{¶11} When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement. *Hamilton Ins. Serv. Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 273, 714 N.E.2d 898, citing *Employers' Liab. Assur. Corp. v. Roehm* (1919), 99 Ohio St. 343, 124 N.E. 223, syllabus. See, also, Section 28, Article II, Ohio Constitution. We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St.3d 130, 31 OBR 289, 509 N.E.2d 411, paragraph one of the syllabus. We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy. *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 7 O.O.3d 403, 374 N.E.2d 146, paragraph two of the syllabus. When the language of a written contract is clear, a court may look no

further than the writing itself to find the intent of the parties. Id. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning. *Gulf Ins. Co. v. Burns Motors, Inc.* (Tex.2000), 22 S.W.3d 417, 423.

{¶12} On the other hand, where a contract is ambiguous, a court may consider extrinsic evidence to ascertain the parties' intent. *Shifrin v. Forest City Enterprises, Inc.* (1992), 64 Ohio St.3d 635, 597 N.E.2d 499. A court, however, is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties. Id.; *Blosser v. Enderlin* (1925), 113 Ohio St. 121, 148 N.E. 393, paragraph one of the syllabus ("there can be no intendment or implication inconsistent with the express terms [of a written contract]").

{¶13} It is generally the role of the finder of fact to resolve ambiguity. See, e.g., *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St.3d 64, 609 N.E.2d 144. However, where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party. *Cent. Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413, 16 O.O.3d 441, 406 N.E.2d 515. In the

insurance context, the insurer customarily drafts the contract. Thus, an ambiguity in an insurance contract is ordinarily interpreted against the insurer and in favor of the insured. *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus.

{¶14} There are limitations to the preceding rule. "Although, as a rule, a policy of insurance that is reasonably open to different interpretations will be construed most favorably for the insured, that rule will not be applied so as to provide an unreasonable interpretation of the words of the policy." *Morfoot v. Stake* (1963), 174 Ohio St. 506, 23 O.O.2d 144, 190 N.E.2d 573, paragraph one of the syllabus. Likewise, where "the plaintiff is not a party to [the] contract of insurance * * *, [the plaintiff] is not in a position to urge, as one of the parties, that the contract be construed strictly against the other party." *Cook v. Kozell* (1964), 176 Ohio St. 332, 336, 27 O.O.2d 275, 199 N.E.2d 566. This rings especially true where expanding coverage beyond a policyholder's needs will increase the policyholder's premiums. Id.

A. Uninsured Motorist Coverage

1. The *Scott-Pontzer* Decision

{¶15} The insurance industry customarily uses standardized forms promulgated by the Insurance Services Office, Inc. ("ISO"). The ISO forms are generically written to provide for the insurance needs of a wide range of policyholders. Combinations of the various standardized forms are used to create a customized policy for each policyholder. This is accomplished by using base forms such as Commercial Auto, Personal Auto, Personal Umbrella, or Commercial General Liability, which are supplemented by state-specific endorsements that expand or limit the extent of insurance coverage in accordance with the desire of the parties and with each state's laws.

{¶16} The ISO identifies the "Ohio Uninsured Motorist Coverage" endorsement as form CA 2133. Form CA 2133 is routinely included in policies issued to individuals, partnerships, corporations, and government entities. This form is part of the Aetna policy sub judice and was at issue in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116.

{¶17} Since *Scott-Pontzer*, this court has been asked to decide a number of cases that center on the term "you" in form CA 2133. Form CA 2133 delineates four classes of

"who is an insured" for uninsured motorist coverage. The first class is "you"; however, "you," is not defined in Form CA 2133. Form CA 2133 is merely a modification of the main policy form, in this case "Business Auto Coverage Form" (Form CA 0001), which defines "you" as "the Named Insured shown in the Declarations." The Aetna policy identifies the named insured, i.e., policyholder, as Quagliata's Restaurants, Inc.

{¶18} In *Scott-Pontzer*, this court relied upon *King* to find "you" to be ambiguous because it referred to a corporation, which "cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle." 85 Ohio St.3d at 664, 710 N.E.2d 1116. This court opined that "naming the corporation as the insured is meaningless unless the coverage extends to some person or persons—including to the corporation's employees." Id. This court stated, "[L]anguage in a contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of the insured and strictly against the insurer. Accordingly, we conclude that *Pontzer*, at the time of his death, was an insured under the * * * policy for purposes of underinsured

motorist coverage." Id. at 665, 710 N.E.2d 1116 (internal citation and quotation omitted).

2. Other Jurisdictions and *Scott-Pontzer*

{¶19} Our reasoning in *Scott-Pontzer* has been questioned. See, e.g., *Seaco Ins. Co. v. Davis-Irish* (C.A.1, 2002), 300 F.3d 84, 87 (labeling *Scott-Pontzer* as anomalous for consciously departing from the tenet that the intent of the parties controls the interpretation of a contract); *Gibson v. New Hampshire Ins. Co.* (S.D.Ohio 2001), 178 F.Supp.2d 921, 922, fn. 2, 3 (referring to *Scott-Pontzer's* reasoning as a "mystery" and its conclusion as "preposterous"); *Szabo v. CGU Internatl. Ins., PLC* (S.D.Ohio 2002), 227 F.Supp.2d 820, 830, 833-834, fn.15 (citing "distracting internal inconsistencies" in *Scott-Pontzer* and classifying portions of it as "beguiling"); *Lawler v. Fireman's Fund Ins. Co.* (N.D.Ohio 2001), 163 F.Supp.2d 841, 842, 843 (strongly disagreeing with *Scott-Pontzer* and referring to the resulting "mess" and to the Ohio Supreme Court's "distortion" of the law). Further, the *Scott-Pontzer* rationale stands in stark contrast with decisions of the vast majority of states that have considered similar issues. See, e.g., *Concrete Services, Inc. v. United States Fid. & Guar. Co.* (1998), 331 S.C. 506, 498

S.E.2d 865; *Grain Dealers Mut. Ins. Co. v. McKee* (Tex.1997), 943 S.W.2d 455; *Buckner v. Motor Vehicle Acc. Indemn. Corp.* (1985), 66 N.Y.2d 211, 495 N.Y.S.2d 952, 486 N.E.2d 810; *Foote v. Royal Ins. Co. of Am.* (1998), 88 Hawaii 122, 962 P.2d 1004; *Am. States Ins. Co. v. C & G Contracting, Inc.* (1996), 186 Ariz. 421, 924 P.2d 111; *Michigan Twp. Participating Plan v. Pavolich* (1998), 232 Mich.App. 378, 591 N.W.2d 325; *Younger v. Reliance Ins. Co.* (Tenn.App.1993), 884 S.W.2d 453. Although not controlling, this broad-based disagreement with and criticism of *Scott-Pontzer* supports our decision to revisit the subject.

3. The Intention of the Parties to the Contract

{¶20} The general intent of a motor vehicle insurance policy issued to a corporation is to insure the corporation as a legal entity against liability arising from the use of motor vehicles. *King v. Nationwide Ins. Co.*, 35 Ohio St.3d at 211, 519 N.E.2d 1380. It is settled law in Ohio that a motor vehicle operated by an employee of a corporation in the course and scope of employment is operated by and for the corporation and that an employee, under such circumstances, might reasonably be entitled to uninsured motorist coverage under a motor vehicle insurance policy

issued to his employer. Id. at 213, 519 N.E.2d 1380. See, also, *Selander v. Erie Ins. Group* (1999), 85 Ohio St.3d 541, 709 N.E.2d 1161. However, an employee's activities outside the scope of employment are not of any direct consequence to the employer as a legal entity. An employer does not risk legal or financial liability from an employee's operation of a non-business-owned motor vehicle outside the scope of employment. Consequently, uninsured motorist coverage for an employee outside the scope of employment is extraneous to the general intent of a commercial auto policy.

{¶21} Nevertheless, in *Scott-Pontzer*, this court held that an uninsured motorist endorsement that identifies "you" as the named insured where "you" refers to a corporation must extend coverage to an employee outside the course and scope of employment. Soon thereafter, this court expanded upon *Scott-Pontzer* by holding that the same policy form also provides uninsured motorist coverage to a resident relative of an employee of a corporate policyholder. *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142.

{¶22} Throughout this process, this court did not reconcile construing the contractual language to provide

insurance to off-duty employees, and to the family members of those employees, with the absence of any benefit to the policyholder, i.e., the corporation. In due course, we will turn to these questions. First, we examine the purported ambiguity.

4. Ambiguity and the Corporate Entity

{¶23} The UM/UIM endorsement language before us is:

{¶24} "B. WHO IS AN INSURED"

{¶25} "1. You.

{¶26} "2. If you are an individual, any 'family member.'

{¶27} "3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' The covered 'auto' must be out of service because of its breakdown, repair, servicing, loss or destruction.

{¶28} "4. Anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.' "

{¶29} The first class of who is insured—"you"—readily applies where the policyholder is an individual. Its application is ambiguous where the

policyholder is a corporation. *King v. Nationwide*, 35 Ohio St.3d 208, 519 N.E.2d 1380. In King, we analyzed an earlier version of the Ohio Uninsured Motorist Endorsement that contained a different formulation of who is an insured. King held that a motor vehicle operated by an employee in the scope of his employment was operated by and for the corporation, thereby equating the employee to the corporation for the purpose of work-related activities and injuries. Id. at 213, 519 N.E.2d 1380. We then held that because the employee occupied the vehicle operated by the corporation, the employee was within the class of " 'anyone else' * * * occupying * * * any other motor vehicle while it is being operated by you." Id.

{¶30} Our reasoning in King took an unnecessary step. We found coverage for the employee as an occupant of the vehicle that was operated by the corporation. However, the vehicle was operated by the corporation through the very employee we found to be "anyone else." Although this logic is valid, it is tenuous to classify an individual as both "you" and "anyone else" at the same instant.

{¶31} The employee in *King* acted on behalf of the corporation while operating the vehicle. This is why we

found the employee to be "you." Further analysis was unnecessary. Because the employee qualifies as "you" while operating a motor vehicle on behalf of the corporation, he is entitled to uninsured motorist coverage. Accordingly, we follow *Scott-Pontzer* to the extent that it held that an employee in the scope of employment qualifies as "you" as used in CA 2133, and thus, is entitled to uninsured motorist coverage.

{¶32} We cannot, however, extend this coverage to an employee outside the scope of employment. As previously discussed, *King* found that an employee was insured for uninsured motorist coverage as an occupant of a vehicle operated by the corporation where the employee was within the scope of employment. The *Scott-Pontzer* court properly focused on the term "you," but in so doing confused the employee's status as an individual with the employee's status as an agent of the corporation. The court held that where "you" is defined as a corporation for the purposes of insuring against bodily injury sustained by "you," the term must be read to extend insurance coverage to each employee regardless of whether he was acting within the course and scope of employment. In this manner, *Scott-Pontzer*

dramatically departed from *King*'s sound rationale that an employee qualifies as "you" under a policy issued to a corporation only when within the scope of employment.

{¶33} In *Scott-Pontzer*, this court reasoned that "naming the corporation as the insured is meaningless unless the coverage extends to some person or persons—including to the corporation's employees." 85 Ohio St.3d at 664, 710 N.E.2d 1116. However, this statement does not support the untenable extension of insured status to employees outside the scope of employment.

5. Construing Ambiguity in Favor of the Policyholder

{¶34} As discussed above, contract law requires that, where parties to a contract have unequal bargaining power, ambiguities be construed in favor of the nondrafting party. In the insurance context, we have assumed that the insurer, as the drafter of the policy, is always in a stronger bargaining position than is the insured. Thus, ambiguities are construed in favor of the insured. A claimant, however, is not necessarily an insured.

{¶35} An insured can be the policyholder or another who is entitled to insurance coverage under the terms of the

policy. When a court decides whether a claimant is insured under a policy, ambiguities are construed in favor of the policyholder, not the claimant. *Cook v. Kozell*, supra; *West v. McNamara* (1953), 159 Ohio St. 187, 197, 50 O.O. 229, 111 N.E.2d 909 ("The universal rule that insurance policies are to be construed strictly in favor of the insured operates in favor of such insured persons as are covered by the policy, and * * * is not applicable to extend the coverage of the policy to absurd lengths so as to provide a right of action * * *"). In *Scott-Pontzer*, we failed to analyze how ruling that an employee is insured outside the course and scope of employment favors the policyholder. Rather, we asked which construction favored the claimant. While an ambiguity is construed in favor of one who has been determined to be insured, an ambiguity in the preliminary question of whether a claimant is insured is construed in favor of the policyholder. Id. Accord *Inland Rivers Serv. Corp. v. Hartford Fire Ins. Co.* (1981), 66 Ohio St.2d 32, 34, 20 O.O.3d 20, 418 N.E.2d 1381 ("It is undisputed that one seeking to recover on an insurance policy generally has the burden of * * * demonstrating coverage under the policy"). If the policyholder's interest is not considered at this initial phase,

we risk construing the policy against the policyholder. *Grant Thornton v. Windsor House, Inc.* (1991), 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 ("Only a party to a contract or an intended third-party beneficiary of a contract may bring an action on a contract in Ohio"). *Scott-Pontzer* concluded otherwise.

{¶36} In resolving this alleged ambiguity, the proper question is whether interpreting the policy to cover all employees of the policyholder, regardless of whether the employee is acting within the course and scope of employment—and all family members of the employees—favors the policyholder.

{¶37} The purpose of a commercial auto policy is to protect the policyholder. *King v. Nationwide Ins. Co.*, supra. Providing uninsured motorist coverage to employees who are not at work or, for that matter, to every employee's family members is detrimental to the policyholder's interests. See *Cook v. Kozell*, 176 Ohio St. at 336, 27 O.O.2d 275, 199 N.E.2d 566.

{¶38} King held that the use of a vehicle "by and for" the corporate policyholder precipitated coverage. This holding is reasonable because it arguably benefits the

policyholder to insure against losses sustained by those operating vehicles on its behalf. This point was lost in *Scott-Pontzer*, which did not focus upon the critical inquiry of whether the loss occurred within the scope of employment—a necessary factor for the establishment of insurance coverage in *King*.

{¶39} *Scott-Pontzer* ignored the intent of the parties to the contract. Absent contractual language to the contrary, it is doubtful that either an insurer or a corporate policyholder ever conceived of contracting for coverage for off-duty employees occupying noncovered autos, let alone the family members of the employees. The *Scott-Pontzer* court construed the contract in favor of neither party to the contract, preferring instead to favor an unintended third party. The *Scott-Pontzer* court even acknowledged that the expansion of coverage for an employee outside the course and scope of employment "may be viewed by some as a result that was not intended by the parties to the insurance contracts at issue." 85 Ohio St.3d at 666, 710 N.E.2d 1116. The United States Supreme Court has not shied away from overturning state court decisions that unreasonably contort a contract. *Piqua*, 57 U.S. (16 How.) at 391-392, 14 L.E.2d 977 ("The decision

of the Supreme Court of the State [of Ohio] is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment. To follow the construction of a State court in such a case, would be to surrender one of the most important provisions in the federal Constitution"). See, also, *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (the sovereignty of a state "has limits when its exercise effects substantial modifications of private contracts" [internal quotations and citations omitted]).

B. Insurance Coverage for Family Members

{¶40} In *Ezawa*, we relied upon the *Scott-Pontzer* definition of "you" to find that the second class of insureds on Form CA 2133—"if you are an individual, any family member"—extends uninsured motorist coverage to a family member of an employee. In addition to relying upon the logic of *Scott-Pontzer*, *Ezawa* also erred by not interpreting the second class of insureds as a nullity. Insurance policies are no longer written in manuscript for each policyholder, but rather are standard forms designed to insure a variety of entities, including individuals. "There is nothing sinister

about an insurer's use of a 'one size fits all' policy form." *Seaco Ins. Co. v. Davis-Irish*, 300 F.3d at 87.

{¶41} The second class of insureds applies when the policyholder is an individual. It is simply inapposite when the policyholder is a corporation, just as it is inapposite where an individual policyholder resides alone, and as the fourth class is inapposite where no one is entitled to recover for another's bodily injury. One who argues a contorted use of an inapposite section of a standard form "confuses superfluity with inapplicability." Id. It is unnecessary for each of the four classifications to apply to every insurance policy as long as the parties to the insurance policy agree upon whether a particular claimant is intended to be insured.[2]

{¶42} In hindsight we see the problems inherent in our earlier opinions. This court, however, follows the doctrine of stare decisis and will abandon a previous holding only when it is incumbent upon us to do so.

III

{¶43} The doctrine of stare decisis is designed to provide continuity and predictability in our legal system. We

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2. It may be argued that this statement supports the overruling of *King*. However, *King* stands strong under the stare decisis test articulated below.

adhere to stare decisis as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs. *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4-5, 539 N.E.2d 103. Those affected by the law come to rely upon its consistency. *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604. Accordingly, stare decisis is long revered. See, e.g., 1 Blackstone, Commentaries on the Laws of England (1765) 70 ("precedents and rules must be followed, unless flatly absurd or unjust * * *"). However, a supreme court not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors. *State v. Jenkins* (2000), 93 Hawaii 87, 112, 997 P.2d 13; see, also, *Mitchell v. W.T. Grant Co.* (1974), 416 U.S. 600, 627-628, 94 S.Ct. 1895, 40 L.Ed.2d 406.

{¶44} "[T]he doctrine of stare decisis is of fundamental importance to the rule of law. Like the United States Supreme Court, we recognize that our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. But any departure from the doctrine of stare decisis demands

special justification." *Wampler v. Higgins* (2001), 93 Ohio St.3d 111, 120, 752 N.E.2d 962 (Internal citations and quotations omitted). This principle is universally accepted and unquestioned. Reasonable disagreement may arise only over which circumstances constitute "special justification."

{¶45} Although this court is no stranger to overruling precedent,[3] we have not adopted a standard by which to judge whether a past decision should be abandoned. Justice Frankfurter opined that stare decisis should be abandoned only "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. at 119, 60 S.Ct. 444, 84 L.Ed. 604. Justice Scalia takes a pragmatic approach, believing that a precedent should be abandoned where the rule is "wrong in principle," "unstable

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3. In the field of insurance law, see, e.g., *Ferrando v. Auto-Owners Mut.Ins.Co.*, 98 Ohio St.3d186,2002-Ohio-7217, 781 N.E.2d 927, overruling portions of *Bogan v. Progressive Cas. Ins. Co.* (1988), 36 Ohio St. 3d 22, 521 N.E.2d 447; *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.3d 397, overruling *Motorists Mut. Ins. Co. v. Said* (1992), 63 Ohio St.3d 690, 590 N.E.2d 1228; and *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, 620 N.E.2d 809, overruling *Burris v. Grange Mut. Cos.* (1989), 46 Ohio St.3d 84, 545 N.E.2d 83.

in application," and undermined by various exceptions and contradictions. *United States v. Dixon* (1993), 509 U.S. 688, 709-711, 113 S.Ct. 2849, 125 L.Ed.2d 556.

{¶46} Other state supreme courts have opined as to when stare decisis should be abandoned.[4] Under any of these standards, *Scott-Pontzer* would be justly overturned.

{¶47} The Supreme Court of Michigan has formulated a standard that incorporates factors used by other

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4. The Idaho Supreme Court will reverse itself when a decision has proven over time to be unjust or unwise. *State v. Humpherys* (2000), 134 Idaho 457, 660, 8 P.3d 652. Maine abandons precedent that "lacks vitality and the capacity to serve the interests of justice." *State v. Rees* (Me.2000), 748 A.2d 976, 977. Arkansas will break from precedent where adherence to the rule would cause great injury or injustice. *Aka v. Jefferson Hosp. Assn, Inc.* (2001), 344 Ark. 627, 641, 42 S.W.3d 508. Many states will part from cases that were wrong when decided. *Ex Parte State Farm Fire & Cas. Co.* (Ala.2000), 764 So.2d 543, 545-546; *State Commercial Fisheries Entry Comm. v. Carlson* (Alaska 2003), 65 P.3d 851, 859; *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue* (Mo.2002), 94 S.W.3d 388, 390-391; *Shoup v. Wal-Mart Stores, Inc.* (Or.2003), 335 Ore. 164, 174, 61 P.3d 928; *State v. Mauchley* (Utah 2003), 67 P.3d 477, 481. Others will not follow past decisions that are unworkable or poorly reasoned. *J&M Land Co. v. First Union Natl. Bank* (2001), 166 N.J. 493, 521, 766 A.2d 1110; *Riney v. State* (Tex. Crim. App.2000), 28 S.W.3d 561, 565; see, also, *Payne v. Tenn.* (1991), 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720.

states: (1) whether the decision was wrongly decided, (2) whether the decision defies practical workability, (3) whether reliance interests would cause an undue hardship, and (4) whether changes in the law or facts no longer justify the questioned decision. *Pohutski v. Allen Park* (2002), 465 Mich. 675, 694, 641 N.W.2d 219. The Michigan court created a well-structured method of ensuring a disciplined approach to deciding whether to abandon a precedent. Accordingly, we adopt a modified version of it here.

{¶48} The first and fourth Michigan factors operate as alternatives—a decision either must have been wrong at the time it was decided, or was initially correct, but the passage of time has rendered it obsolete. Thus, in Ohio, a prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship

for those who have relied upon it.[5] We now apply this test to *Scott-Pontzer*.

A. *Scott-Pontzer* was Erroneously Decided

{¶49} As previously discussed, *Scott-Pontzer* was wrongly decided. See Section II, above. Whether someone is insured under an insurance policy should not be interpreted in favor of one who was not a party to the contract. This was the law in Ohio long before *Scott-Pontzer*. *Cook v. Kozell*, 176 Ohio St. at 336, 27 O.O.2d 275, 199 N.E.2d 566 (the plaintiff who is not a party to the insurance contract is not in a position to urge a construction of the contract that would be detrimental to both parties to the contract); *West v. McNamara*, supra. We should have followed this well-settled and intrinsically sound precedent, which is verified by

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5. Subsequent to the initial drafting of this opinion, the United States Supreme Court utilized a similar trifold stare decisis test in *Lawrence v. Texas* (2003), 539 U.S., 123 S.Ct. 2472, 2482-2483. The test was synthesized by a dissenting justice: "Today's approach to *stare decisis* invites us to overrule an erroneously decided precedent * * * *if*: (1) its foundations have been 'eroded' by subsequent decisions, *ante*, at 2482; (2) it has been subject to 'substantial and continuing' criticism, ibid.; and (3) it has not induced 'individual or societal reliance' that counsels against overturning, *ante*, at 2483." Id. at 2489 (emphasis sic) (Scalia, J., dissenting).

experience. Instead, we ventured to a point where the definition of "you" became immaterial to its meaning and the intention of the parties was ignored.

B. The Unworkable Nature of *Scott-Pontzer*

1. *Scott-Pontzer* Has Caused Chaos in the Courts

{¶50} *Scott-Pontzer* and its progeny defy practical workability. The multitude of post-*Scott-Pontzer* issues before this court,[6] the widespread criticism of the decision from other jurisdictions,[7] and the numerous conflicts emanating from the lower courts[8] indicate that the decision muddied the waters of insurance coverage litigation, converted simple liability suits into complex multiparty litigation, and created massive and widespread confusion—the antithesis of what a decision of this court should do. Attorneys are forced to file briefs and appendixes

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6. See, e.g., *Bagnoli v. Northbrook Prop. & Cas. Ins. Co.* (1999), 86 Ohio St.3d 314, 715 N.E.2d 125; *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St.3d 445, 739 N.E.2d 338; *Kemper v. Michigan Millers Mut. Ins. Co.*, 98 Ohio St.3d 162, 2002-Ohio-7101, 781 N.E.2d 196; and *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927.

7. Ante, ¶ 19

8. For example, there are currently 23 cases before this court that await this opinion. All told, there are over 90 *Scott-Pontzer* related cases pending before this court.

that are several inches thick in an attempt to form a coherent picture out of the post-*Scott-Pontzer* morass.

{¶51} This chaos resulted from this court's failure to explain why the intent of the parties was not controlling. The *Scott-Pontzer* court also failed to acknowledge or explain its departure from precedent. To uphold *Scott-Pontzer* is to summarily reject the well-reasoned precedents of Cook and West. This we must not do.

2. Exceptions and Contradictions to *Scott-Pontzer*.

{¶52} As previously discussed, the courts of Ohio are deluged by cases arising from *Scott-Pontzer* and its progeny. If we allow the objectionable aspects of *Scott-Pontzer* to stand, a patchwork of exceptions to, and limitations of, *Scott-Pontzer* would be the likely result.

{¶53} The case before us asks whether the addition of an endorsement entitled "Drive Other Car Coverage—Broadened Coverage for Named Individuals" to the commercial motor vehicle policy prevents the *Scott-Pontzer* ambiguity from being read into the policy. A broadened-coverage endorsement extends a commercial motor vehicle insurance policy's coverage to a list of specific

individuals when those individuals or their spouses use vehicles not otherwise covered under the policy.

{¶54} The broadened-coverage endorsement can be seen as altering the *Scott-Pontzer* analysis in two ways. First, Aetna argues that the inclusion of these individuals prevents any ambiguity from forming because "you" must be read to mean the specific individuals listed in the broadened-coverage endorsement. Thus, because there is uninsured motorist coverage provided for individuals, the term "you" is not rendered ambiguous. Second, Aetna invokes expressio unius to argue that by expressly covering the individuals listed in the broadened-coverage endorsement, the contract shows that the parties did not intend to extend uninsured motorist coverage to every employee and employee's family member.

{¶55} Aetna's second argument carries great weight, for the intent of the parties is paramount. Here, Quagliata's Restaurants paid $881 to have seven individuals covered under the broadened-coverage endorsement. Of that amount, $565 was for uninsured motorist premiums. It is clear that the parties thought this to be an expansion of uninsured motorist coverage. However, ruling that including individuals

on a broadened-coverage endorsement prevents "you" from being ambiguous would not be without its problems. That ruling would require that paying an additional premium actually reduces the coverage available under the policy. This is neither a just result nor a logical consistency.

{¶56} Besides the broadened-coverage issue presented in this case, additional exceptions to *Scott-Pontzer* are sought in cases currently pending before this court.[9] Creating exceptions to *Scott-Pontzer* would add to the confusion and arbitrariness, not lessen them.

{¶57} The rationale of *Scott-Pontzer* does not withstand scrutiny. If we were to slowly create a patchwork of exceptions and limitations, we would abandon certainty in the law and contribute to the continuing morass of litigation. Maintaining *Scott-Pontzer* as precedent, while eviscerating it with exceptions, would not respect the principle of stare decisis but mock it, and would continue the chaos in our insurance jurisprudence. See *United States v. Dixon* at 711, 113 S.Ct. 2849, 125 L.Ed.2d 556.

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9. Some of the pending issues are whether *Scott-Pontzer* applies to policies issued to partnerships, schools, or collectively to a business and an individual; to fronting policies; or where the terms and conditions of coverage have been violated.

C. Reliance Interests

{¶58} The final part of our test is whether undue hardship would be visited upon those who have relied on *Scott-Pontzer*. "[T]he Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson v. Detroit* (2000), 462 Mich. 439, 466, 613 N.W.2d 307. If overruling a precedent would cause chaos, it should be upheld even if wrongly decided.

{¶59} No reliance interest will be jeopardized by limiting *Scott-Pontzer*. First, *Scott-Pontzer* cannot be relied upon when policyholders purchase uninsured motorist coverage. The General Assembly has enacted changes to R.C. 3937.18 expressly to supersede *Scott-Pontzer*. Section 3, 2001 Am.Sub.S.B. No. 97 (eff. Oct. 31, 2001). Second, the overwhelming majority of *Scott-Pontzer* cases are resurrected claims from the years prior to the *Scott-Pontzer* decision.[10] Because no one was aware of this form of uninsured motorist

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10. This is due to Ohio's 15-year statute of limitations on contract claims, R.C. 2305.06, and partially because insurers acted quickly to modify their policies after the *Scott-Pontzer* decision.

coverage before it was created by that decision, no one could have relied upon it. Finally, the potential that anyone would have reduced his personal uninsured motorist coverage based upon the belief that his employer's insurer, or his family member's employer's insurer, would provide this coverage is practically nonexistent. Thus, there is no individual or societal reliance upon *Scott-Pontzer* outside of the courtroom.

{¶60} Limiting *Scott-Pontzer* will restore order to our legal system by returning to the fundamental principles of insurance contract interpretation. "It does no violence to the legal doctrine of stare decisis to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law." *State ex rel. Lake Cty. Bd. of Comms. v. Zupancic* (1991), 62 Ohio St.3d 297, 300, 581 N.E.2d 1086.

IV

{¶61} For the foregoing reasons, we hereby limit *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* to apply only where an employee is within the course and scope of employment. We overrule *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* "Since neither experience nor reason and justice support the rule[s], but in fact militate against [them],

this court would be doing less than its duty, even giving due and careful consideration to the rule of stare decisis, to perpetuate [them] or add yet another ramification or exception." *Carter-Jones Lumber Co. v. Eblen* (1958), 167 Ohio St. 189, 207, 4 O.O.2d 256,147 N.E.2d 486.

{¶62} Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment. Additionally, where a policy of insurance designates a corporation as a named insured, the designation of "family members" of the named insured as "other insureds" does not extend insurance coverage to a family member of an employee of the corporation, unless that employee is also a named insured.

{¶63} In this case, Jason Galatis's death was unrelated to his mother's employment with Quagliata's Restaurants. Therefore, the Aetna insurance policy issued to Quagliata's Restaurants does not provide coverage here. Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., DEGENARO and LUNDBERG STRATTON, JJ., concur.

MOYER, C.J., and LUNDBERG STRATTON, J., concur separately.

RESNICK, J., dissents.
RESNICK and F.E. SWEENEY, JJ., dissent.
PFEIFER, J., dissents.

MARY DEGENARO, J., of the Seventh Appellate District, sitting for Cook, J.

MOYER, C. J., concurring.

{¶64} This court has recently accepted jurisdiction over several cases, including the one at bar, in which a party has affirmatively requested that we overrule *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116. Having accepted this issue for review,[11] the court today stands at a crossroads. The court may follow the doctrine of stare decisis and attempt to minimize the impact of *Scott-Pontzer* by creating a patchwork of exceptions to and limitations of the holding therein. Alternatively, the court

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11. See, e.g., *Monroe Guar. Ins. Co. v. Kuba*, case No. 2003-0213, 98 Ohio St.3d 1564, 2003-Ohio-2242, 787 N.E.2d 1229; *Sekula v. Hartford Ins. Co.*, case No. 2003-0729, 99 Ohio St.3d 1510, 2003-Ohio-3957, 792 N.E.2d 198; *McNeeley v. Pacific Employers Ins. Co.*, case No. 2003-1302, 100 Ohio St.3d 1437, 2003-Ohio-5513, 797 N.E.2d 515.

may depart from a rigid application of the doctrine and, in a single pronouncement, right that which is clearly wrong. See *State ex rel. Lake Cty. Bd. of Comms. v. Zupancic* (1991), 62 Ohio St.3d 297, 300, 581 N.E.2d 1086. For the reasons stated in the majority opinion, I believe that the latter charts the better course toward restoring order to insurance law in Ohio.

{¶65} As a staunch and consistent advocate of stare decisis, I concur in the majority opinion only after considerable deliberation. I joined Justice Cook's dissent in *Scott-Pontzer* because I believed that neither the commercial policy nor the excess policy should be construed to provide UIM coverage to an off-duty employee driving his spouse's car. Under most circumstances, I would not vote to overrule a precedent established by the majority of this court. The doctrine of stare decisis, as I observed in *Gallimore v. Children's Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244, 257, 617 N.E.2d 1052, embodies "a fundamental element of American jurisprudence—consistency and predictability." (Moyer, C.J., dissenting.) My dissent in *Gallimore*, however, also recognized that " 'stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' " Id., quoting *Helvering v. Hallock* (1940), 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604.

{¶66} The majority opinion refines this principle and, in so doing, sets forth a tripartite standard that honors

stare decisis by preventing arbitrary and discriminatory enforcement of the law while relieving courts of the obligation to apply stare decisis with "petrifying rigidity." *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 438, 628 N.E.2d 46. We serve the bench and the bar by adopting a cogent, clear standard by which to test claims that our precedents should not be followed. There can be little doubt that *Scott-Pontzer* should be limited under this standard.

{¶67} Our decision today does not mark a change in my belief in the importance of the predictability and consistency produced by stare decisis. No one should assume that our decision heralds a new era in which prior cases of this court will be routinely or arbitrarily overruled. Our decision, rather, is a narrow response to a decision widely recognized as an error of law, which, if left uncorrected, would have continued to produce consequences that even the majority in *Scott-Pontzer* could not have foreseen. To that end, I am reminded of this court's assertion over four decades ago:

{¶68} " '[C]ases and situations arise in which the need for a change is imminent. This becomes acutely apparent when a rule with dubious beginnings hangs on tenaciously in the face of a much needed change. Case after case will display the death throes of the old rule and at the same time the reluctance of the judges to overrule it.' " *Gibbon v. Young Women's Christian Assn. of Hamilton* (1960), 170 Ohio St. 280, 289, 10 O.O.2d 334, 164 N.E.2d

563, quoting Feather, The Immunity of Charitable Institutions from Tort Liability (1959), 11 Baylor L.Rev. 86, 106.

{¶69} This observation could be no more prophetic than here: case after case before us reveals the impracticality of *Scott-Pontzer* and thus gives rise to the question of whether the reluctance of judges to overrule it will prevail in the face of a much needed change. I join the majority today as we create and apply a standard that will serve this court and all who are bound by its decision.

LUNDBERG STRATTON, J., concurs in the foregoing concurring opinion.

ALICE ROBIE RESNICK, J., dissenting.

{¶70} This case comes to us through a certified conflict on the following issue, as stated by the court of appeals: "Whether the inclusion of a 'Broadened Coverage Endorsement,' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein." The court of appeals certified its decision on this issue as in conflict with the decisions of the Fifth District Court of Appeals in *Burkhart v. CNA Ins. Co.* (Feb. 25, 2002), Stark App. No. 2001CA00265, 2002 WL 316224; and *Still v. Indiana Ins. Co.* (Feb. 25, 2002), Stark App. No. 2001CA00300, 2002 WL 358652. This court determined that a conflict exists and ordered the parties to brief the issue as stated. 96 Ohio St.3d 1446, 2002-Ohio-3512, 771 N.E.2d 260. When the court

accepts a certified-conflict case for review, it issues an order "identifying those issues raised in the case that will be considered by the Supreme Court on appeal." S.Ct.Prac.R. IV(2)(C). Our order identified only the issue stated in the certification order.

{¶71} Rather than confining itself to deciding the certified issue, the majority expands the scope of this appeal on the merits by drastically "limiting" the holding of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, and overruling *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142. In the process of reaching those conclusions, the majority expands the reach of its opinion to yet another level by propounding as syllabus law a general, supposedly objective, test to be applied whenever this court considers whether stare decisis should be rejected and a previous decision of this court overruled.

{¶72} Appellee conceded the validity of *Scott-Pontzer* in both the trial court and the court of appeals below, and proceeded at both levels on the theory that it should prevail on other grounds. The trial court found that *Scott-Pontzer* applied but further found that coverage pursuant to that decision was unavailable because appellants failed to comply with notice and subrogation provisions in the insurance policy. Appellants appealed from that decision, and Aetna cross-appealed. As one of its points, Aetna argued that the policy at issue in this case differs from the policy at issue in *Scott-Pontzer* because the broadened-coverage

endorsement in the Aetna policy removes the ambiguity over the word "you" and therefore distinguishes this case from *Scott-Pontzer*. This argument had been raised by Aetna in the trial court, but by ruling that coverage was potentially available under *Scott-Pontzer*, the trial court obviously did not accept Aetna's argument. Notably, appellee never raised any argument in the court of appeals challenging the rationale underlying *Scott-Pontzer*. The court of appeals affirmed the trial court's judgment solely on the broadened-coverage-endorsement grounds urged by Aetna. The court of appeals then certified a conflict on that issue to this court for review.

{¶73} In its brief filed here, appellee uses seven pages of its brief to respond to appellants' arguments relating to the impact of the broadened-coverage endorsement. Appellee then expounds for 28 pages on why *Scott-Pontzer* should be overruled, going to great lengths to argue a position that was never raised below and that was not in any way responsive to appellants' brief on the merits. Appellee's position is inconsistent with all of its arguments below premised on an acceptance of *Scott-Pontzer* and could not have been anticipated by appellants. Under S.Ct.Prac.R. VI(4)(A), appellants were allowed only 20 pages for their reply brief, which ordinarily should be enough to counter the points in a typical appellee brief, but which were not nearly enough to reply to this ambush.

{¶74} Given all of the above considerations, this case is not the appropriate vehicle for the majority to accomplish its goals. This case is about broadened-coverage

endorsements and nothing more. As a certified-conflict case that should be confined to a narrow issue, it is certainly not about whether *Scott-Pontzer* should have continuing validity. Because the majority's reach exceeds the limits inherent in this appeal, I dissent.

FRANCIS E. SWEENEY, SR., J., dissenting.

{¶75} Today the majority considers extraneous arguments to reach a result more palatable to them than the existing law. In so doing, they ignore our rules of practice and well-established precedents and unnecessarily modify stare decisis, a long-standing principle of American jurisprudence. For these reasons, I dissent.

{¶76} First, this case comes before us as a certified question. The Supreme Court Rule of Practice governing this procedure, S.Ct.R.Prac. IV 3(B), provides: "In their merit briefs, the parties shall brief the issues identified in the order of the Supreme Court as issues to be considered on appeal." The case was certified to settle a disagreement among the appellate districts on the effects of the broadened-coverage endorsement in a UIM/UM insurance provision. While Aetna gives lip service to the certified issue, the main thrust of its brief is to convince the court to overrule and limit established case law on different issues. These issues are not properly before the court, and, therefore, the majority should not decide them.

{¶77} Not only were these issues not properly certified, none of the arguments on them was raised by Aetna during summary judgment proceedings or during its appeal to the Ninth District Court of Appeals. Aetna did not challenge the viability of *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116; or *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142, until after the case was certified and after it appeared that the composition of this court would change. We have always held that issues not raised below are waived. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099. The majority ignores this well-established principle.

{¶78} Moreover, in deciding to reexamine *Scott-Pontzer*, the majority fails to abide by the long-standing rule of stare decisis. Stare decisis is the policy that a court follow its past decisions. The significance of this rule cannot be overstated. Without it, litigants may try to challenge precedent every time there is a change in the composition of the court. If this is allowed, issues will never be resolved as long as one side believes that a new court will save the day in another case.

{¶79} In *State ex rel. Allison v. Jones* (1960), 170 Ohio St. 323, 10 O.O.2d 417, 164 N.E.2d 417, a new justice was faced with the chance to overrule a recent decision by the old court. In refusing to do so, he had this to say:

{¶80} "On another occasion, each of my six colleagues was privileged to consider a situation identical to

that here presented and to arrive at his individual conclusion unfettered by established and existing law. Alone of the seven members of this court, I have not had the opportunity of passing upon the issue * * * without the restriction of a controlling decision of this court directly in point. Exercising judgment in the enviable aura of unrestricted choice, three of my colleagues chose each of the two divergent courses * * *, and each now adheres to his position so adopted. I enjoy no such freedom of choice and consider myself bound to follow what has now been established as the law of this state. Whether I find the result to be palatable is of concern only to myself." Id. at 324, 10 O.O.2d 417, 164 N.E.2d 417 (Peck, J., concurring).

{¶81} Justice Peck further recognized:

{¶82} "Such a change in the pronounced law can only result from an abandonment of a doctrine which may well be considered the heart and core of Anglo-Saxon jurisprudence. That doctrine is referred to as stare decisis, a phrase which is an abbreviation of a maxim adjuring the courts 'to stand by precedent, and not to disturb settled points.' " Id. at 325, 10 O.O.2d 417, 164 N.E.2d 417, quoting *Ballard Cty. v. Kentucky Cty. Debt Comm.* (1942), 290 Ky. 770, 772-773, 162 S.W.2d 771.

{¶83} I quote Justice Peck because he was faced with precisely the same situation that faces this new court, but he chose a different outcome because he felt duty-bound to follow established case law. His guidance, in the name of stare decisis, should be heeded.

{¶84} Adherence to precedent has several laudatory goals, including certainty, equality, efficiency, and the appearance of justice. Padden, Note, Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After *Payne v. Tennessee* (1994), 82 Geo.L.J. 1689. The goal of certainty is promoted "by allowing individuals to arrange their affairs with confidence, assured in the knowledge that the law that will be applied to them in the future will be the same as currently applied." Id. at 1691. Equality is accomplished "by treating like cases alike." Id. at 1692. Efficiency is promoted because "[o]nce a previous court has addressed difficult policy questions, subsequent courts need not expend time and resources to readdress those issues, but can rely on the wisdom of the previous court." Id. The last reason is the appearance of justice. This goal "conforms to the public's notion that Supreme Court Justices should be making impartial rules of law and not * * * law based on personal biases." Id. at 1693.

{¶85} Traditionally, courts have accepted three circumstances under which it is proper to overrule precedent: "when there has been an intervening development of law, when the rule it promulgated has proved unworkable, or when its underlying reasoning is outdated or inconsistent with contemporary values." Id. at 1694. Although these reasons have withstood the test of time, the majority feels compelled to craft new rationale in syllabus law. This is done despite the long-held view that any discussion of stare decisis is

dicta. Id. at 1690, fn. 6. "Dicta" is defined as "[e]xpressions in court's opinions which go beyond the facts before court and therefore are * * * not binding in subsequent cases as legal precedent." Black's Law Dictionary (6th Ed.1990) 454.

{¶86} I am especially troubled by the first and third reasons espoused by the majority in the syllabus. As to the first reason (that the prior decision was wrongly decided), I ask, Who decides whether a decision was wrongly decided? In *Scott-Pontzer*, we were examining specific UIM policy language that had not previously been examined by the court. In reaching our decision, we did not overrule any prior decision. In fact, we followed the established law that when ambiguous policies permit more than one reasonable interpretation, the one that favors the insured must prevail. This time-tested principle encourages precise policy language, protects insureds who rely upon their reasonable understanding of the policies, and precludes insurers from profiting from their sloppy draftsmanship. If our interpretations in these cases contravened the intent of the insurance companies, it was the obligation of the insurance companies to rewrite their policies. Indeed, this is what happened after *Scott-Pontzer*. In response to the ambiguities, insurance companies rewrote their contracts to better describe the scope of coverage provided. See majority opinion, fn. 10.

{¶87} Perhaps even more troubling is the third new ground for overruling precedent (that overruling will not impose an undue hardship for those who have relied upon the decision). How can this factor be met here? Even the

majority concedes that many pending cases raise *Scott-Pontzer* issues. These cases involve individual litigants who have devoted much time and money in pursuing their claims. Therefore, how can the majority even suggest that no undue hardship is created by this decision?

{¶88} Thus, even though recent cases are not immune to being overruled, a change in court composition is not a sufficient reason for abandoning precedent. Padden, Overruling Decisions, supra, 82 Geo.L.J. at 1719. Instead, I believe that the majority should recognize that prior rulings of this court are still valid and binding even after a member of the majority has left the bench.

{¶89} Moreover, I believe that the majority commits error in adopting new rationale for overruling precedent. There is no reason to abandon the time-tested principles for applying stare decisis.

{¶90} For all these reasons, I dissent.

RESNICK, J., concurs in the foregoing dissenting opinion.

PFEIFER, J., dissenting.

{¶91} The fallout from this court's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, has resulted not from a failure of legal analysis but from a failure in insurance policy drafting. The majority today tries to fix that problem. It focuses its criticism on this court's decision in *Scott-Pontzer*, but, in the

end, it is the insurance policy language that is rewritten. The majority does not overrule *Scott-Pontzer*—it just makes it more affordable.

{¶92} The central dilemma in *Scott-Pontzer* was who is "You" in a corporate UM/UIM policy listing "You" as an insured? If "You" is the corporation, the coverage is illusory—a corporation is not capable of suffering physical or emotional damage, or even of shedding a tear. To find that "You" was the corporation would have meant that insurers had collected premiums for coverage that applied to no one. Certainly, no insurance company would purposely do that.

{¶93} The other possibility was that the "You" meant actual human beings—employees—capable of suffering injury. Was "You" someone or was it no one? The majority in *Scott-Pontzer* opted for the interpretation that the policy language had meaning and that coverage was available.

{¶94} Who constituted "You" was the sole ambiguity we needed to resolve in *Scott-Pontzer*. We followed our universal and longstanding precedent to construe ambiguities against the drafter of the contract, in this case, the insurer. From there, the rest of the policy language took over. There were no "in the workplace" or "in the scope of employment" limitations to the coverage. There were no ambiguities to resolve, because there was no limiting language even to consider.

{¶95} Today, the majority determines, as did the majority in *Scott-Pontzer*, that the answer to the question "Who is 'You?' " is "employees." It arrives at the same basic

conclusion as the *Scott-Pontzer* majority, while pillorying that earlier decision. As in *Scott-Pontzer*, the majority here rejects outright the insurers' argument that, at best, the "You" means only employees driving covered automobiles.

{¶96} Resolving the ambiguity of "You" the same way the *Scott-Pontzer* majority did, the majority here has found a way for that interpretation not to harm insurers. It creates some new limitations of coverage for the corporate employees that it has determined are the actual insureds. Although insurers did not include these limitations in their policies, the majority reasons that they meant to. Despite the fact that the insurers in both *Scott-Pontzer* and in this case argued that being on the job for the employer was not sufficient for an employee driving a personally owned vehicle to qualify for UM/UIM coverage, the majority divines that an employee who is simply acting within the scope of his employment is covered. Apparently, this court knows the intent of the insurers better than the insurers do.

{¶97} This court in *Scott-Pontzer* determined what the policy said; today, this court determines what the policy should have said. By deciding that UM/UIM policies apply to employees acting within the scope of their employment, the majority acknowledges that coverage is actually far broader than the insurers were willing to concede. But by limiting the employees covered to include only those on the job, the majority has effectively swept away the bulk of *Scott-Pontzer* claimants, and saved the insurers from their own policy language.

{¶98} The decision in *Scott-Pontzer* has little precedential value—the insurance contract language it interpreted has been revised and is no longer in use. The majority is not fixing a hole in our jurisprudence that is going to adversely affect any future transactions.

{¶99} But let us review what this court does accomplish today: (1) overrules a four-year-old case, (2) achieves that by adopting the central tenet of the case this court attacks, and (3) writes in new coverage limitations to an insurance contract that is no longer in use.

{¶100} The three sitting justices who are in the majority have all been applauded as practitioners of judicial restraint. As to that restraint, I am reminded of the words of the character Inigo Montoya from the movie "The Princess Bride":

{¶101} "You keep using that word. I do not think it means what you think it means."

Bashein & Bashein Co., L.P.A., and W. Craig Bashein; Paul W. Flowers Co., L.P.A., and Paul W. Flowers, for appellants.

Davis & Young, Henry A. Hentemann and Richard M. Garner, for appellee.

Boyk & Crossmock, L.L.C., and Steven L. Crossmock, urging reversal for amicus curiae Ohio Academy of Trial Lawyers.

IN RE UNINSURED AND UNDERINSURED MOTORIST COVERAGE CASES.

[Cite as *In re Uninsured & Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302, 2003-Ohio-5888.]

Motor vehicles — Automobile liability insurance — Uninsured/underinsured motorist coverage — Employer's commercial automobile liability policy covers loss sustained by employee only if loss occurs within the course and scope of employment — Scott-Pontzer v. Liberty Mut. Fire Ins. Co., limited — Designation of "family members" of the named insured as other insureds does not extend coverage to a family member of an employee of a corporation.

(Submitted November 3, 2003 -- Decided November 5, 2003.)

The following dispositions of currently pending appeals, certified conflicts, and certified questions of state law are hereby entered based on our decision in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.Moyer, C.J., Lundberg Stratton, O'Connor and O'Donnell, JJ., concur.

Resnick, F.E. Sweeney and Pfeifer, JJ., dissent.

I

The judgments of the courts of appeals in the following cases are affirmed:

1) 2002-1122 and 2002-1459. *Alatsis v. Nationwide Ins. Ent.*, Franklin App. No. 01AP-1038, 2002-Ohio-2906, 2002 WL 1275521.

2) 2002-1245 and 2002-1271. *Estate of Houser v. Motorists Ins. Co.*, Auglaize App. No. 2-02-02, 2002-Ohio-2845, 2002 WL 1299778.

3) 2002-1336. *Withem v. Cincinnati Ins. Co.*, Franklin App. No. 01AP-1286, 2002-Ohio-3067, 2002 WL 1339062.

4) 2002-1925 and 2002-2121. *Skala v. Grange Ins. Co.*, Summit App. No. 20941, 2002-Ohio-5040, 2002 WL 31115067.

5) 2002-1989. *Addie v. Linville*, Cuyahoga App. Nos. 80547 and 80916, 2002-Ohio-5333, 2002 WL 31195177.

6) 2002-2066 and 2002-2188. *Miller v. Grange Mut. Cas. Co.*, Stark App. No. 2002CA00058, 2002-Ohio-5763, 2002 WL 31386738.

7) 2002-2139. *Szekeres v. State Farm Fire & Cas. Co.*, Licking App. No. 02CA00004, 2002-Ohio-5989, 2002 WL 31439821.

8) 2002-2158. *Thorne v. Amerisure Ins. Co.*, Summit App. No. 21137, 2002-Ohio-6123, 2002 WL 31513632.

9) 2003-0074. *Knox v. Travelers Ins. Co.*, Franklin App. No. 02AP-28, 2002-Ohio-6958, 2002 WL 31819651.

10) 2003-0153. *Niese v. Maag*, Putnam App. No. 12-02-06, 2002-Ohio-6986, 2002 WL 31778046.

11) 2003-0239. *Mlecik v. Farmers Ins. Co.*, Cuyahoga App. No. 81110, 2002-Ohio-6222, 2002 WL 31528752.

12) 2003-0353. *Bergmeyer v. Auto Owners Ins. Co.*, Stark App. No. 2002CA00228, 2003-Ohio-133, 2003 WL 124254.

13) 2003-0391 and 2003-0535. *Wilke v. Montes*, Ottawa App. No. OT-02-003, 2003-Ohio-217, 2003 WL 139751.

14) 2003-0492 and 2003-0493. *Rice v. Buckeye State Mut. Ins. Co.*, Logan App. No. 8-02-24, 2003-Ohio-390, 2003 WL 193472.

15) 2003-0500. *Jones v. Gue*, Summit App. Nos. 21118 and 21136, 2003-Ohio-358, 2003 WL 187574.

16) 2003-0510. *Mazza v. Am. Continental Ins. Co.*, Summit App. No. 21192, 2003-Ohio-360, 2003 WL 187580.

17) 2003-0524. *Wiley v. Grange Mut. Cas. Co.*, Summit App. No. 21145, 2003-Ohio-539 2003 WL 246009.

18) 2003-0641. *Buckley v. Wintering*, Franklin App. No. 02AP-511, 2003-Ohio-824, 2003 WL 462476.

19) 2003-0778 and 2003-0780. *Musser v. Musser*, Adams App. No. 02CA750, 2003-Ohio-1440, 2003 WL 1463141.

20) 2003-0794. *Heath v. Fid. & Cas. Co. of New York*, Summit App. No. 21221, 2003-Ohio-1303, 2003 WL 1240384.

21) 2003-0805. *Adams v. Fink*, Ross App. No. 02CA2660, 2003-Ohio-1457, 2003 WL 1494982.

22) 2003-0840 and 2003-0981. *Frisch v. CNA Commercial Ins.*, Seneca App. Nos. 13-02-36 and 13-02-40, 2003-Ohio-1574, 2003 WL 1617968.

23) 2003-0938. *Wheeler v. W. Res. Mut. Cas. Co.*, Wayne App. No. 02CA0043, 2003-Ohio-1806, 2003 WL 1825031.

24) 2003-0972. *Shanabarger v. Hartford Ins. Co.*, Hancock App. No. 5-02-61, 2003-Ohio-1912, 2003 WL 1878770.

25) 2003-1065. *Kohntopp v. Hamilton Mut. Ins. Co.*, Wood App. No. WD-02-033, 2003-Ohio-2793, 2003 WL 21255940.

26) 2003-1107. *Davis v. Westfield Cos.*, Lorain App. No. 02CA008114, 2003-Ohio-2339, 2003 WL 21040395.

27) 2003-1122 and 2003-1159. *Universal Underwriters Ins. Co. v. Estate of Miller*, Stark App. No. 2002CA00225, 2003-Ohio-2489, 2003 WL 21101080.

28) 2003-1181. *Landers v. Lucent Technologies, Inc.*, Cuyahoga App. Nos. 81506 and 81531, 2003-Ohio-3326, 2003 WL 21468908.

29) 2003-1183. *Rosenberry v. Morris,* Stark App. No. 2002-CA-00399, 2003-Ohio-2743, 2003 WL 21234586.

30) 2003-1205. *DeLong v. Myers,* Knox App. No. 02CA000035, 2003-Ohio-2702, 2003 WL 21213465.

31) 2003-1268. *Jones v. Morehart,* Seneca App. No. 13-03-06, 2003-Ohio-2995, 2003 WL 21354786.

32) 2003-1271. *Hans v. Hartford Ins. Co.,* Hamilton App. No. C-020500, 2003-Ohio-3045, 2003 WL 21360402.

33) 2003-1277. *Radwandky v. Hartford Ins. Co.,* Cuyahoga App. No. 82249, 2003-Ohio-3029, 2003 WL 21360792.

34) 2003-1307. *Young v. Plageman,* Hancock App. No. 5-02-66, 2003-Ohio-2996, 2003 WL 21354792.

35) 2003-1327. *Rucker v. Davis,* Ross App. No. 02CA2673, 2003-Ohio-3191, 2003 WL 21404101.

36) 2003-1328. *Rucker v. Davis,* Ross App. No. 02CA2677, 2003-Ohio-3189, 20023WL 21404343.

37) 2003-1360. *Smith v. Liberty Mut. Ins. Co.,* Summit App. No. 21311, 2003-Ohio-3160, 2003 WL 21396779.

38) 2003-1375 and 2003-1433. *Westfield Ins. Co. v. Metzler,* Summit App. No. 21517, 2003-Ohio-3788, 2003 WL 21658412.

39) 2003-1470 and 2003-1471. *Hoop v. Nationwide Mut. Fire Ins. Co.,* Montgomery App. No. 19686, 2003-Ohio-3772, 2003 WL 21658596.

Discretionary appeal and certified conflict accepted, motion to consolidate granted, and judgment affirmed.

40) 2003-1477. *Cincinnati Ins. Co. v. Perkins*, Paulding App. No. 11-03-04, 2003-Ohio-3586, 2003 WL 21537634. Discretionary appeal allowed and judgment affirmed.

II

The judgments of the court of appeals in the following cases are reversed:

1) 2002-0803 and 2002-0837. *German v. Therm-O-Disc, Inc.* (Mar. 28, 2002), Richland App. No. 01CA51-2, 2002-Ohio-1848, 2002 WL 553155.

2) 2002-1854. *Roberts v. Wausau Business Ins. Co.*, 149 Ohio App.3d 612, 2002-Ohio-4734, 778 N.E.2d 594.

3) 2002-1986. *Shaw v. State Farm Ins. Co.*, Cuyahoga App. No. 80471, 2002-Ohio-5330, 2002 WL 31195404.

4) 2002-2123. *Kekic v. Royal & SunAlliance Ins. Co.*, Cuyahoga App. No. 80693, 2002-Ohio-5563, 2002 WL 31320296.

5) 2002-2198. *Vicars v. McCray*, Summit App. No. 21087, 2002-Ohio-6033, 31465792.

6) 2002-2214. *Greene v. Westfield Ins. Co.*, Stark App. No. 2002CA00114, 2002-Ohio-6179, 2002 WL 31521451.

7) 2002-2228. *Nationwide Agribusiness Ins. Co. v. Wagner*, Summit App. No. 21013, 2002-Ohio-6119.

8) 2003-0195 and 2003-0430. *Greene v. Westfield Ins. Co.*, Stark App. No. 2002CA00126, 2002-Ohio-7210, 2002 WL 31883437.

9) 2003-0213. *Monroe Guar. Ins. Co. v. Kuba*, Stark App. No. 2002CA00175, 2002-Ohio-7010, 2002 WL 31831412. Proposition of Law No. III is dismissed as having been improvidently allowed.

10) 2003-0232. *Warren v. Hartford Ins. Co.*, Cuyahoga App. No. 81139, 2002-Ohio-7067, 2002 WL 31839170.

11) 2003-0301. *Westfield Ins. Co. v. Wausau Business Ins. Co.*, Stark App. Nos. 2002CA00138 and 2002CA00150, 2002-Ohio-7391, 2002 WL 32098117.

12) 2003-0522. *Congrove v. Wausau Ins. Cos.*, Pickaway App. No. 02CA8, 2003-Ohio-1083, 2003 WL 928485.

13) 2003-0523. *Carle v. Stumbo*, Pickaway App. No. 02CA2, 2003-Ohio-1084, 2003 WL 929217.

14) 2003-0525 and 2003-0603. *Brozovic v. St. Paul Fire & Marine Ins. Co.*, Cuyahoga App. No. 80868, 2003-Ohio-554, 2003 WL 252483.

15) 2003-0532. *Pilo v. Liberty Mut. Fire Ins. Co.*, Ashland App. No. 02-COA-038, 2003-Ohio-662, 2003 WL 302405.

16) 2003-0561. *Dimalanta v. Travelers Ins. Co.*, Cuyahoga App. No. 81445, 2003-Ohio-562, 2003 WL 253749.

17) 2003-0729. *Sekula v. Hartford Ins. Co.*, Cuyahoga App. No. 81295, 2003-Ohio-1160, 2003 WL 1090649.

18) 2003-0844. *Taylor v. Universal Underwriters Ins. Co.*, Franklin App. No. 01AP-922, 2003-Ohio-1446, 2003 WL 1495561.

19) 2003-0845. *Grubb v. Michigan Mut. Ins. Co.*, Montgomery App. No. 19575, 2003-Ohio-1558, 2003 WL 1595175.

20) 2003-0872 and 2003-0983. *Stout v. Travelers Prop. Cas. Ins. Co.*, 152 Ohio App.3d 355, 2003-Ohio-1643, 787 N.E.2d 725.

21) 2003-0896. *Wilson v. Haimerl*, Madison App. No. CA2002-08-017, 2003-Ohio-1774, 1795600.

22) 2003-0923 and 2003-1068. *Archer v. ACE, USA*, 152 Ohio App.3d 455, 2003-Ohio-1790, 788 N.E.2d 662.

23) 2003-0942. *Gates v. Nationwide Ins. Co.*, Clermont App. No. CA2002-10-086, 2003-Ohio-1773, 2003 WL 1795595.

24) 2003-0957. *Lipstreu v. The Hartford*, Cuyahoga App. No. 81515, 2003-Ohio-1729 and 2003-Ohio-1955, 2003 WL 1759608.

25) 2003-1114. *Reppl v. Jones*, Summit App. No. 21299, 2003-Ohio-2350, 2003 WL 21041231.

26) 2003-1250. *Hughes v. Nationwide Mut. Ins. Co.*, Franklin App. Nos. 02AP-1254 and 02AP-1256.

27) 2003-1254. *Hartfield v. Toys "R" Us*, Lucas App. Nos. L-02-1218 and L-02-1228, 2003-Ohio-2905, 2003 WL 21299928.

28) 2003-1319 and 2003-1426. *Tulak v. Meridian Ins. Co.*, Tuscarawas App. No. 2002-AP-11-0088, 2003-Ohio-3290 and 2003-Ohio-4139, 2003 WL 21452666.

29) 2003-1394. *Pratt v. Safe Auto Ins. Co.*, Cuyahoga App. No. 81741, 2003-Ohio-3350, 2003 WL 21469172. Discretionary appeal allowed and judgment reversed.

30) 2003-1400. *Stubbins v. Nationwide Agribusiness Ins. Co.*, Fulton App. No. F-02-031, 2003-Ohio-3456, 2003 WL 21500198. Discretionary appeal accepted on Propositions of Law Nos. I, II, and III.

III

The judgments of the courts of appeals in the following cases are reversed in part:

1) 2003-0258 and 2003-0415. *Poulton v. Am. Economy Ins. Co.*, Stark App. Nos. 2002-CA-00038 and 2002-CA-00061, 2002-Ohio-7214, 2002 WL 31883646. The judgment against Indiana Insurance Company is reversed.

2) 2003-0825. *Edgell v. Monroe Guar. Ins. Co.*, Muskingum App. No. CT2002-0008, 2003-Ohio-1666, 2003 WL 1702993. The finding of coverage under the business automobile liability policy is reversed.

3) 2003-0882. *Riggs v. Motorists Mut. Ins. Co.*, Franklin App. No. 02AP-876, 2003-Ohio-1657, 2003 WL 1701453. The finding of coverage under the business automobile liability policy is reversed.

4) 2003-1086. *Morrison v. Emerson*, Stark App. No. 2002CA00414, 2003-Ohio-2708, 2003 WL 21213659. The judgment against Truck Insurance Exchange is reversed.

5) 2003-1090. *Sagar v. Nationwide Mut. Fire Ins. Co.*, Franklin App. No. 02AP-1104, 2003-Ohio-2268, 2003 WL 21007127. The judgment against Nationwide Mutual Fire Insurance Company and Continental Insurance Company is reversed.

6) 2003-1180. *Blake v. Midwestern Indemn. Co.*, Tuscarawas App. No. 2002AP060049, 2003-Ohio-2698, 2003 WL 21213430. The finding of coverage under the business automobile liability policy is reversed.

7) 2003-1182. *Walker v. Hartford Fire Ins. Co.*, Butler App. No. CA2002-09-219, 2003-Ohio-2545, 2003 WL 21135333. The finding of coverage under the business automobile liability policy is reversed.

8) 2003-1240. *Dalton v. Lumbermens Mut. Ins. Co.*, Stark App. No. 2002CA00198, 2003-Ohio-2897, 2003 WL 21290930. The finding of coverage under the business automobile liability policy is reversed.

9) 2003-1343. *Ryan v. Dolin*, Cuyahoga App. No. 81689, 2003-Ohio-2738, 2003 WL 21234924. The finding of coverage under the business automobile liability policy is reversed.

10) 2003-1396. *Haney v. Motorist Mut. Ins. Co.*, Tuscarawas App. No. 2002AP110093, 2003-Ohio-3412, 2003 WL 21489933. The judgment against Globe American Casualty Company is reversed.

IV

The judgments of the courts of appeals in the following cases are affirmed in part and reversed in part:

1) 2002-0740. *Purvis v. Cincinnati Ins. Co.* (Apr. 12, 2002), Greene App. No. 2001-CA-104, 2002 WL 538926. Appellants' third proposition of law is dismissed as having been improvidently allowed. The finding of coverage under the business automobile liability policy is reversed. The judgment of no coverage under the umbrella policy is affirmed.

2) 2002-2075. *Pahler v. Motorists Mut. Ins. Co.*, Stark App. No. 2002CA00022, 2002-Ohio-5762, 2002 WL 31386706. The judgment in favor of Continental Casualty Insurance Company is affirmed. The judgment in favor of Laura A. Pahler is reversed.

3) 2003-0270. *Dalton v. Travelers Ins. Co.*, Stark App. Nos. 2001CA00380, 2001CA00393, 2001CA00407, and 2001CA00409, 2002-Ohio-7369, 2002 WL 32082856. The judgments in favor of Travelers Insurance Company, Grange Mutual Casualty Company, National Union Fire Insurance Company, and Federal Insurance Company are affirmed. The judgment against Grange Mutual Casualty Company under the umbrella policy is reversed.

4) 2003-0827 and 2003-0867. *Akron Gen. Med. Ctr. v. James*, Holmes App. No. 2002 CA 009, 2003-Ohio-4931, 2003 WL 22144270. The determination of coverage under the business automobile liability policy is reversed. The determination of no coverage under the commercial liability insurance policy is affirmed.

5) 2003-0886. *Franklin v. Am. Mfrs. Mut. Ins. Co.*, Cuyahoga App. No. 81197, 2003-Ohio-1340, 2003 WL 1356016. The determination of no coverage under *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.* (1999), 86 Ohio St.3d 557, 715 N.E.2d 1142, is affirmed. The finding of coverage under *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116, is reversed.

6) 2003-0925 and 2003-1028. *Heidt v. Fed. Ins. Co.*, Stark App. No. 2002CA00314, 2003-Ohio-1785, 2003 WL 1818205. The finding of coverage under the business automobile liability policy is reversed. The determination of no coverage under the commercial liability insurance policy is affirmed.

7) 2003-1330 and 2003-1331. *Amore v. Grange Ins. Co.*, Richland App. No. 02CA76, 2003-Ohio-3202, 2003 WL 21419164. Motion to consolidate with case No. 2003-1329, *Amore v. Grange Ins. Co.*, granted. The judgment in favor of Tokio Marine and Fire Insurance Company, Ltd., is affirmed. The judgment against CNA Insurance Companies is reversed.

8) 2003-1384 and 2003-1714. *Cincinnati Ins. Co. v. Lang*, Lake App. No. 2002-L-063, 2003-Ohio-3267, 2003 WL 21434782. Discretionary appeal and certified conflict accepted. The judgment in favor of Federal Insurance Company and TIG Insurance Company is affirmed. The judgment against Continental Casualty Company is reversed.

V

The judgment of the court of appeals in the following case is vacated:

1) 2003-0427. *Gruelich v. The Hartford*, Cuyahoga App. No. 80987, 2003-Ohio-652, 2003 WL 302412.

The final order of the appellate court is vacated. The December 26, 2002 order, 2002-Ohio-7229, 2002 WL 31883335, is reinstated.

VI

The following stays on briefing are removed:

1) 2002-1742 and 2002-1783. *Wentling v. Motorists Ins. Cos.*, Stark App. No. 2002 CA 00027, 2002-Ohio-4672, 2002 WL 31002825.

2) 2003-1081 and 2003-1092. *Gilchrist v. Gonsor*, Cuyahoga App. No. 80944, 2003-Ohio-2297, 2003 WL 21027290.

VII

Certified Questions of State Law from the United States District Court, Northern District of Ohio, Western Division:

1) 2003-0597. *Williams v. Zurich Am. Ins. Co.* (Mar. 26, 2003), No. 3:02CV7300.

2) The following questions of law are moot:

"1. Was the reduction in UM/UIM coverage executed on January 27, 2000, valid where the insured, a purchaser of a commercial automobile policy, received orally, rather than in writing, information about the availability of UM/UIM coverage, the limits of and premium for such coverage, and a brief description of the coverage?"

"2. Was coverage provided under a commercial automobile policy for injuries incurred by a passenger in a vehicle not owned or operated by a member of the passenger's family, where 'covered autos' is defined as 'only those "autos" you own'?"

"3. If UM/UIM coverage is provided under the commercial automobile policy, is plaintiff required to pay the deductible under that policy?"

The following question is answered in the negative:

"4. Is a daughter of an employee of a company that purchased a commercial umbrella policy an insured under that policy, where that policy does not expressly provide coverage to employees' family members?

3) 2003-0406. *Keegan v. Am. Internatl. Group, Inc.* (Feb. 25, 2003), No. 3:02CV7127.

Both questions of law, quoted below, are moot and will not be answered:

"A. Is the Whirlpool Corporation 'self insured in the practical sense,' so as to be exempt from R.C. 3937.18?"

"B. If so, is the applicability of R.C. § 3937.18 affected by any noncompliance with R.C. § 4509.72 & Ohio Admin.Code § 4501:1-2-05?"

IN THE SUPREME COURT OF OHIO

BRUCE J. GERMAN APPELLEE,	: CASE NO. 02-0803 :
VS.	: DISCRETIONARY APPEAL : FROM THE RICHLAND
THERM-O-DISC, INC.; ET AL.	: CO. COURT OF APPEALS : FIFTH APPELLATE DISTRICT
	: : Court of Appeals : Case No. 01-CA51-2

MOTION FOR RECONSIDERATION OF APPELLEE, BRUCE J. GERMAN, OF THE DECISION ON THE MERITS OF THE CASE IN THE JUDGMENT ENTRY FILED ON NOVEMBER 5, 2003

M. Neal Rains (0013081) (Counsel of Record)
FRANTZ WARD LLP
55 Public Square, 19th Floor
Cleveland, OH 44113-1999
Telephone: (216) 515-1660
Facsimile: (216) 515-1650

COUNSEL FOR APPELLANTS, THERM-O-DISC, INC. AND OLD REPUBLIC INSURANCE COMPANY

ROBERT W. KERPSACK (0041851) (Counsel of Record)
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215
Telephone: (614) 242-1000
Facsimile: (614) 242-4180

COUNSEL FOR APPELLEE, BRUCE J. GERMAN

MOTION FOR RECONSIDERATION OF APPELLEE, BRUCE J. GERMAN, OF THE DECISION ON THE MERITS OF THE CASE IN THE JUDGMENT ENTRY FILED ON NOVEMBER 5, 2003

Appellee, Bruce J. German, hereby moves the Court to reconsider its decision on the merits of the case in the Judgment Entry filed in the present case on November 5, 2003, which summarily reversed the judgment of the Court of Appeals on the authority of Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849. Appellee respectfully submits that this Court's summary reversal of the judgment of the court of appeals in the present case, without first affording the appellee reasonable notice or an opportunity to be heard, is a substantial and unreasonable denial of Appellee's constitutional right of equal protection and due process of law. Appellee further respectfully submits that he possesses vested contractual rights under the Old Republic insurance policies at issue in the present case; therefore, the Galatis decision may not be applied retrospectively against him. Appellee further respectfully submits that Galatis wrongly limits/overrules Scott-Pontzer v. Liberty Mut. Fire Ins. Co. (1999), 85 Ohio St.3d 660, because such limitation of Scott-Pontzer creates an undue hardship upon the parties, the jury, and the lower courts in the present case, and upon countless other Ohio courts, litigants, claimants, and insurers, all of whom relied upon Scott-Pontzer. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the allowed Propositions of Law

in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of any issues of public or great general interest.

On September 4, 2002, this Court filed its Entry in the present case, allowing the present discretionary appeal and ordering the present action held for a decision in Luckenbill v. Hamilton Mut. Ins. Co., Supreme Court Case No. 2001-1807. On October 4, 2002, this Court filed its Entry stating that the Court had dismissed Luckenbill v. Hamilton Mut. Ins. Co., and ordering that the present action be held for a decision in Ferrando v. Auto-Owners Ins. Co., Supreme Court Case No. 2001-1843. On December 27, 2002, this Court issued its decision in Ferrando v. Auto-Owners Ins. Co., 98 Ohio St.3d 186, 2002-Ohio-7217, holding that an insured's unreasonable breach of policy conditions is presumed prejudicial to the insurer, absent evidence to the contrary. Also on December 27, 2002, this Court filed its Entry in the present action ordering that the action be held for a decision in Burkhart v. CNA Ins. Co., Supreme Court Case Number 02-0579. On March 5, 2003, Appellants in the present case filed their Motion to Dissolve/Lift Stay of Briefing. On March 17, 2003, Appellee filed his Memorandum Opposing Appellants' Motion to Dissolve/Lift Stay of Briefing and his Motion to Dismiss the present discretionary appeal. On April 23, 2003, this Court filed its Entry denying the parties' motions. The present action then remained dormant until November 5, 2003, when this Court filed its one-page Judgment Entry summarily reversing the judgment of the court of appeals on the authority of Galatis.

This Judgment Entry was Mr. German's first notice that his rights were before the Court in Galatis.

In Griffin v. Illinois (1956), 351 U.S. 12, 18, the United States Supreme Court held that where a state provides a process of appellate review, the procedures utilized must comply with constitutional dictates of due process and equal protection. In Ohio, Section 3(B)(1)(f), Article IV of the state Constitution provides for the establishment of an appellate court system with jurisdiction "[i]n any cause on review as may be necessary to its complete determination." With the formal adoption of this appellate court review process, Ohio litigants possess a property interest in the appellate process. See Atkinson v. Grumman Ohio Corp. (1988), 37 Ohio St.3d 80. Ohio litigants cannot be deprived, therefore, of this property right without procedural due process of law. Griffin.

Procedural due process has been held to protect "* * * those fundamental principles of liberty and justice which lie at the base of our civil and political institutions * * *," Hurtado v. California (1884), 110 U.S. 516, 535, and to guarantee those procedures which are required for the "* * * protection of ultimate decency in a civilized society," Adamson v. California (1947), 332 U.S. 46, 61 (Frankfurter, J., concurring). Procedural due process places upon the government the duty to give reasonable notice, and an opportunity to be heard, to those whose interests in life, liberty or property are adversely affected by governmental action. Tribe, American Constitutional Law (2 Ed. 1988) 683, Section 10-8.

Appellee, Bruce German, has a property interest in the present discretionary appeal. Atkinson. As such, Mr. German is entitled to procedural due process, which requires that he receive notice that his rights are before the court and be afforded an opportunity to be heard on the merits of his case. In the present case, however, Appellee, Bruce German, received no notice whatsoever that the issues in his case were before this Court in Galatis. Indeed, briefing in German was ordered stayed pending a decision in Burkhart v. CNA Ins. Co, not Galatis. Moreover, Mr. German had no reason to even suspect that he was an interested party in Galatis. At a minimum, Mr. German possessed a due process right to receive notice from this Court either that his rights were before the Court in Galatis or that his case was going to be decided on the authority of Galatis. Without such notice, however, Mr. German was denied an opportunity to be heard either on the merits of his case or on the merits of Galatis. With no such opportunity to be heard in the present discretionary appeal, Mr. German was denied his constitutionally-protected right of equal protection and procedural due process of law.

The allowed Propositions of Law in the present discretionary appeal are in no way even remotely similar to the issue ordered briefed in the Galatis certified conflict. In Galatis, this Court ordered the parties to brief the following issue:

> "Whether the inclusion of a 'Broadened Coverage Endorsement,' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein?"

In the present discretionary appeal, this Court allowed the following Propositions of Law:

1. The requirements of prompt notice of claims and preservation of the insurer's subrogation rights are conditions precedent to coverage, including UM/UIM coverage implied by operation of law; and
2. The policy deductible applies to coverage imposed by law, since the deductible is a fundamental provision of the policy, not an exclusion applicable only to the liability coverage of the policy.

Unlike the policy at issue in Galatis, the Old Republic policies at issue in the present case do not contain a broadened coverage endorsement. In fact, the issue of whether the Old Republic policies contain an ambiguous term "you" is not even an issue raised on appeal in the present case. Indeed, the only appealable issues in the present case are whether Mr. German complied with policy conditions relating to prompt notice and subrogation/consent to settle and whether the underinsured motorist coverage provided to Mr. German by operation of the former Ohio Uninsured Motorist Statute is subject to the same deductible amount that is attributable to the bodily injury liability coverage under the Old Republic policies. As such, Appellee, Bruce German, had no notice or reason to believe that his rights may be before this Court in Galatis. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the allowed Propositions of Law in the present case be fully briefed, argued, and reheard on the merits. In

the alternative, this court should order the present discretionary appeal dismissed for want of any issues of public or great general interest.

Regarding Appellants' Proposition of Law No. I in the present case (alleged breaches of policy conditions relating to prompt notice and subrogation/consent to settle), this Court's decision in Ferrando v. Auto-Owners Ins. Co. fully resolves this issue. Regarding Proposition of Law No. II in the present case (whether un/underinsured motorist coverage provided by operation of law is subject to the same deductible amount attributable to the policy's bodily injury coverage), this issue was never even pleaded, raised, or argued in the lower courts; therefore, this Court lacks jurisdiction over the issue. Indeed, no issues of public or great general interest are presented in the instant action. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the present discretionary appeal be dismissed as having been improvidently allowed.

Moreover, the reversal of the judgment of the court of appeals in the present case on the authority of Galatis is contrary to this Court's decision in Peerless Elec. Co. v. Bowers (1955), 164 Ohio St. 209. In Peerless, this Court held as follows:

> "[t]he general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. The one general exception to this rule is

> where contractual rights have arisen or vested rights have been acquired under the prior decision." Peerless, at 210.

In the present case, Appellee, Bruce German, possesses vested contractual rights under the Old Republic insurance policies at issue. In this regard, Appellants, Old Republic Insurance Company and Therm-O-Disc, Inc., conceded in the trial court and in the court of appeals that Mr. German is an insured under the Old Republic policies at issue. Consequently, any argument that Mr. German is not an insured under the Old Republic policies has been waived. See Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 121. As an insured, Mr. German is vested with contractual rights under the Old Republic policies; therefore, the Galatis decision may not be applied retrospectively against him. Peerless.

In summarily reversing the judgment of the court of appeals, however, this Court retrospectively applies its decision in Galatis to the present case. Such retrospective application of Galatis is contrary to this Court's decision in Peerless. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the allowed Propositions of Law in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of any issues of public or great general interest.

Finally, Appellee, Bruce German, respectfully submits that Galatis was wrongly decided. In Galatis, this Court adopted the following trifold stare decisis test for overruling a prior decision of the Ohio Supreme Court:

1. The decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision;

2. the decision defies practical workability; and

3. abandoning the precedent would not create an undue hardship for those who have relied upon it.

Appellee, Bruce German, respectfully submits that the Galatis limitation of this Court's prior decision in Scott-Pontzer fails the third prong of the Galatis stare decisis test. In this regard, the present case and many other cases before this Court are graphic examples of the undue hardship created by Galatis, which precludes any abandonment of Scott-Pontzer.

In reliance upon the Scott-Pontzer decision, Appellee, Bruce German, retained legal counsel and filed the present civil action against his employer, Therm-O-Disc, Inc., seeking discovery of the motor vehicle liability insurance policies maintained by the employer. In reliance upon the Scott-Pontzer decision, the employer and its insurer, Old Republic Insurance Company, retained legal counsel and produced to Mr. German copies of the requested insurance policies. In reliance upon the Scott-Pontzer decision, Mr. German sought declaratory judgment in the present action that the Old Republic insurance policies at issue provide un/underinsured

motorist coverage for his damages arising from a crash with a drunk driver on January 9, 1997, in which Mr. German was catastrophically injured. In reliance upon the Scott-Pontzer decision, Appellants, Therm-O-Disc, Inc., and Old Republic Insurance Company, conceded in the trial court that Mr. German was an insured under the policies in question, but defended the declaratory judgment action, nonetheless, contending that Mr. German failed to comply with general policy conditions of prompt notice and protection of subrogation/consent to settle. In reliance upon the Scott-Pontzer decision, the parties filed cross-motions for summary judgment. In reliance upon the Scott-Pontzer decision, the trial court granted summary judgment in favor of Mr. German and denied Appellants, Therm-O-Disc, Inc.'s, and Old Republic Insurance Company's, motion for summary judgment. In reliance upon the Scott-Pontzer decision, the trial court convened a four-day jury trial on the issue of damages. In reliance upon the Scott-Pontzer decision, the jury returned a verdict in favor of Mr. German and against Old Republic Insurance Company in the amount of $1,490,023.00. In reliance upon the Scott-Pontzer decision, the trial court entered final judgment in favor of Old Republic Insurance Company, finding that the un/underinsured motorist coverage provided under the Old Republic policies by operation of law is subject to the same $2 million deductible amount that is attributable to the policies' bodily injury liability coverage.

In reliance upon the Scott-Pontzer decision, the parties in the present case filed cross-notices of appeal to the Fifth District Court of Appeals of Ohio. In reliance upon the Scott-

Pontzer decision, the parties briefed and argued to the court of appeals their assignments of error. In reliance upon the Scott-Pontzer decision, the court of appeals reversed the judgment of the trial court. In reliance upon the Scott-Pontzer decision, the court of appeals certified a conflict to this Court. In reliance upon the Scott-Pontzer decision, Therm-O-Disc, Inc., and Old Republic Insurance Company filed a notice of discretionary appeal to this Court.

In reliance upon the Scott-Pontzer decision, Appellee, Bruce German, has expended approximately $15,000.00, exclusive of attorneys fees, in prosecuting his underinsured motorist claims at issue. Clearly, the parties, the jury, and the lower courts in the present case have expended significant amounts of time, money, and resources in reliance upon the Scott-Pontzer decision. It cannot be disputed, therefore, that limiting Scott-Pontzer creates an undue hardship for those who have relied upon it in the present case. It also cannot be disputed that the present case stands as a graphic example of how the Galatis Court's limitation of Scott-Pontzer fails the third prong of the Galatis trifold stare decisis test. Accordingly, Galatis was wrongly decided. This Court should, therefore, grant Appellee, Bruce German's, motion for reconsideration, finding that Galatis fails the trifold stare decisis test adopted by this Court for overruling a prior decision of the Court .

In summary, this Court's reversal of the judgment of the court of appeals in the present case, without first affording Appellee, Bruce German, reasonable notice or an opportunity to be heard, is a substantial and unreasonable denial of

Appellee's constitutional right of equal protection and due process of law. Furthermore, the Galatis decision cannot be applied retrospectively to the present discretionary appeal because Appellee, Bruce German, possesses vested contractual rights under the Old Republic insurance policies at issue. Finally, the parties, the jury, and the lower courts in the present case all relied upon Scott-Pontzer, and the Galatis limiting/overruling of Scott-Pontzer creates an undue hardship in the present case. Accordingly, this Court should grant Appellee, Bruce J. German's, motion for reconsideration, ordering that the allowed Propositions of Law in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of any issues of public or great general interest.

/s/_____
ROBERT W. KERPSACK (0041851)
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215

Telephone: (614) 242-1000
Facsimile: (614) 242-4180

COUNSEL FOR APPELLEE,
BRUCE J. GERMAN

PROOF OF SERVICE

This is to certify that a true copy of the foregoing Motion for Reconsideration of Appellee, Bruce German, of the Decision on the Merits of the Case in the Judgment Entry Filed on November 5, 2003, was served upon M. Neal Rains, Counsel for Appellants, Therm-O-Disc, Inc., and Old Republic Insurance Company, FRANTZ WARD LLP, 55 Public Square, 19th Floor, Cleveland, OH 44113-1999, by ordinary U.S. Mail, this _____ day of November, 2003.

_____

ROBERT W. KERPSACK (0041851)
COUNSEL FOR APPELLEE,
BRUCE J. GERMAN

IN THE SUPREME COURT OF OHIO

BRUCE J. GERMAN	: CASE NO. 02-0803
APPELLEE,	:
	: DISCRETIONARY APPEAL
VS.	: FROM THE RICHLAND
	: CO. COURT OF APPEALS
THERM-O-DISC, INC.; ET AL.	: FIFTH APPELLATE DISTRICT
	:
	: Court of Appeals
	: Case No. 01-CA51-2

MOTION FOR RECONSIDERATION OF APPELLEE, BRUCE J. GERMAN, OF THE DECISION ON THE MERITS OF THE CASE IN THE JUDGMENT ENTRY FILED ON NOVEMBER 5, 2003

M. Neal Rains (0013081) (Counsel of Record)
FRANTZ WARD LLP
55 Public Square, 19th Floor
Cleveland, OH 44113-1999
Telephone: (216) 515-1660
Facsimile: (216) 515-1650

**COUNSEL FOR APPELLANTS,
THERM-O-DISC, INC.
AND OLD REPUBLIC INSURANCE COMPANY**

ROBERT W. KERPSACK (0041851) (Counsel of Record)
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215
Telephone: (614) 242-1000
Facsimile: (614) 242-4180

COUNSEL FOR APPELLEE, BRUCE J. GERMAN

MOTION FOR RECONSIDERATION OF APPELLEE, BRUCE J. GERMAN, OF THE DECISION ON THE MERITS OF THE CASE IN THE JUDGMENT ENTRY FILED ON NOVEMBER 5, 2003

Appellee, Bruce J. German, hereby moves the Court to reconsider its decision on the merits of the case in the Judgment Entry filed in the present case on November 5, 2003, which summarily reversed the judgment of the Court of Appeals on the authority of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. Appellee respectfully submits that this Court's summary reversal of the judgment of the court of appeals in the present case, without first affording the appellee reasonable notice or an opportunity to be heard, is a substantial and unreasonable denial of Appellee's constitutional right of equal protection and due process of law. Appellee further respectfully submits that he possesses vested contractual rights under the Old Republic insurance policies at issue in the present case; therefore, the *Galatis* decision may not be applied retrospectively against him. Appellee further respectfully submits that *Galatis* wrongly limits/overrules *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, because such limitation of *Scott-Pontzer* creates an undue hardship upon the parties, the jury, and the lower courts in the present case, and upon countless other Ohio courts, litigants, claimants, and insurers, all of whom relied upon *Scott-Pontzer*. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the certified conflict in the present case be fully briefed, argued, and reheard on the merits. In the

alternative, this court should order the present appeal dismissed for want of a conflict between the decision of the Richland County Court of Appeals and any valid decision of another Ohio appellate court.

On September 4, 2002, this Court filed its Entry in the present case, allowing the present certified conflict and ordering the present action held for a decision in *Luckenbill v. Hamilton Mut. Ins. Co.*, Supreme Court Case No. 2001-1807. On October 4, 2002, this Court filed its Entry stating that the Court had dismissed *Luckenbill v. Hamilton Mut. Ins. Co.*, and ordering that the present action be held for a decision in *Ferrando v. Auto-Owners Ins. Co.*, Supreme Court Case No. 2001-1843. On December 27, 2002, this Court issued its decision in *Ferrando v. Auto-Owners Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, holding that an insured's unreasonable breach of policy conditions is presumed prejudicial to the insurer, absent evidence to the contrary. Also on December 27, 2002, this Court filed its Entry in the present action ordering that the action be held for a decision in *Burkhart v. CNA Ins. Co.*, Supreme Court Case Number 02-0579. On March 5, 2003, Appellants in the present case filed their Motion to Dissolve/Lift Stay of Briefing. On March 17, 2003, Appellee filed his Memorandum Opposing Appellants' Motion to Dissolve/Lift Stay of Briefing and his Motion to Dismiss the present certified conflict appeal. On April 23, 2003, this Court filed its Entry denying the parties' motions. The present action then remained dormant until November 5, 2003, when this Court filed its one-page Judgment Entry summarily reversing the judgment of the court of appeals on the authority of *Galatis*. This Judgment Entry was Mr.

German's first notice that his rights were before the Court in *Galatis*.

In *Griffin v. Illinois* (1956), 351 U.S. 12, 18, the United States Supreme Court held that where a state provides a process of appellate review, the procedures utilized must comply with constitutional dictates of due process and equal protection. In Ohio, Section 3(B)(1)(f), Article IV of the state Constitution provides for the establishment of an appellate court system with jurisdiction "[i]n any cause on review as may be necessary to its complete determination." With the formal adoption of this appellate court review process, Ohio litigants possess a property interest in the appellate process. See *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80. Ohio litigants cannot be deprived, therefore, of this property right without procedural due process of law. *Griffin.*

Procedural due process has been held to protect "* * * those fundamental principles of liberty and justice which lie at the base of our civil and political institutions * * *," *Hurtado v. California* (1884), 110 U.S. 516, 535, and to guarantee those procedures which are required for the "* * * protection of ultimate decency in a civilized society," *Adamson v. California* (1947), 332 U.S. 46, 61 (Frankfurter, J., concurring). Procedural due process places upon the government the duty to give reasonable notice, and an opportunity to be heard, to those whose interests in life, liberty or property are adversely affected by governmental action. Tribe, *American Constitutional Law* (2 Ed. 1988) 683, Section 10-8.

Appellee, Bruce German, has a property interest in the present certified conflict appeal. *Atkinson.* As such, Mr. German is entitled to procedural due process, which requires that he receive notice that his rights are before the court and be afforded an opportunity to be heard on the merits of his case. In the present case, however, Appellee, Bruce German, received no notice whatsoever that the issues in his case were before this Court in *Galatis.* Indeed, briefing in *German* was ordered stayed pending a decision in *Burkhart v. CNA Ins. Co,* not *Galatis.* Moreover, Mr. German had no reason to even suspect that he was an interested party in *Galatis.* At a minimum, Mr. German possessed a due process right to receive notice from this Court either that his rights were before the Court in *Galatis* or that his case was going to be decided on the authority of *Galatis.* Without such notice, however, Mr. German was denied an opportunity to be heard either on the merits of his case or on the merits of *Galatis.* With no such opportunity to be heard in the present certified conflict appeal, Mr. German was denied his constitutionally-protected right of equal protection and procedural due process of law.

In the present case, the Richland County Court of Appeals certified that its decision in the instant action conflicts with the following decisions of other Ohio District Courts of Appeal:

1. *Luckenbill v. Midwestern Indemn. Co.* (2001), 143 Ohio App.3d 501; certified conflict *allowed* at 93 Ohio St.3d 1487;

2. *Ferrando v. Auto-Owners Ins. Co.* (September 4, 2001), Ashtabula App. No. 2000-A-0038, unreported, discretionary appeal *allowed* at 94 Ohio St.3d 1451; and

3. *Green v. Cincinnati Ins. Co.* (December 7, 2001), Huron App. No. H-01-018, unreported, discretionary appeal *not allowed* at 95 Ohio St.3d 1425, 2002-Ohio-1760.

The court of appeals in the present case further certified the following issue of law to this Court for review and final resolution:

> "Whether the terms and conditions, including notice, subrogation, and deductible provisions, contained in a Business Auto Policy or Commercial General Liability Policy, apply to UM/UIM coverage which arises by operation of law."

On July 24, 2002, this Court ordered dismissed the certification of conflict in *Luckenbill*, holding that the action had been improvidently certified and that there was a want of a conflict. See *Luckenbill v. Midwestern Indemn. Co.*, 96 Ohio St.3d 1203, 2002-Ohio-3524. On December 27, 2002, this Court issued its decision in *Ferrando v. Auto-Owners Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, holding that an insured's unreasonable breach of policy conditions is presumed prejudicial to the insurer, absent evidence to the contrary. After *Ferando*, any alleged conflicts between the court of appeals decision in the present case and the decisions of other Ohio appellate courts were fully resolved. Furthermore, Appellants in the present case never even raised in the lower courts the issue of that

Appellant, Therm-O-Disc, Inc., and *not* Appellant, Old Republic Insurance Company, is financially responsible for satisfying the judgment in favor of Mr. German on his underinsured motorist claim. Accordingly, Appellee respectfully submits that this argument has been waived, and this Court lacks jurisdiction to consider the issue. See *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121. This Court should grant, therefore, Appellee, Bruce German's, motion for reconsideration, ordering that the certified conflict issue in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of a conflict between the decision of the Richland County Court of Appeals and any valid decision of another Ohio appellate court.

The certified issue of law in the present case is in no way even remotely similar to the issue certified in the *Galatis*. In *Galatis*, this Court ordered the parties to brief the following issue:

> "Whether the inclusion of a 'Broadened Coverage Endorsement,' adding individual named insureds to a commercial motor vehicle liability policy, eliminates any ambiguity over the use of the term 'you' therein?"

Unlike the policy at issue in *Galatis*, the Old Republic policies at issue in the present case do not contain a broadened coverage endorsement. Furthermore, the issue of whether the Old Republic policies in question contain an ambiguous term "you" (the issue upon which *Galatis* was decided) is not even an issue raised on appeal in the instant action. Indeed, the only appealable issues in the present case

are whether Mr. German complied with policy conditions relating to prompt notice and subrogation/consent to settle and whether the underinsured motorist coverage provided to Mr. German by operation of the former Ohio Uninsured Motorist Statute is subject to the same deductible amount that is attributable to the bodily injury liability coverage under the Old Republic policies. As such, Appellee, Bruce German, had no notice or reason to believe that his rights may be before this Court in *Galatis*. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the allowed certified conflict issues in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of a conflict between the decision of the Richland County Court of Appeals and any valid decision of another Ohio appellate court.

Moreover, the reversal of the judgment of the court of appeals in the present case on the authority of *Galatis* is contrary to this Court's decision in *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209. In *Peerless*, this Court held as follows:

> "[t]he general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. The one general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision." *Peerless*, at 210.

In the present case, Appellee, Bruce German, possesses vested contractual rights under the Old Republic insurance policies at issue. In this regard, Appellants, Old Republic Insurance Company and Therm-O-Disc, Inc., conceded in the trial court and in the court of appeals that Mr. German is an insured under the Old Republic policies at issue. Consequently, any argument that Mr. German is not an insured under the Old Republic policies has been waived. *Goldfuss*. As an insured, Mr. German is vested with contractual rights under the Old Republic policies; therefore, the *Galatis* decision may not be applied retrospectively against him. *Peerless*.

In summarily reversing the judgment of the court of appeals, however, this Court retrospectively applies its decision in *Galatis* to the present case. Such retrospective application of *Galatis* is contrary to this Court's decision in *Peerless*. Accordingly, this Court should grant Appellee, Bruce German's, motion for reconsideration, ordering that the certified conflict issues in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of a conflict between the decision of the Richland County Court of Appeals and any valid decision of another Ohio appellate court.

Finally, Appellee, Bruce German, respectfully submits that *Galatis* was wrongly decided. In *Galatis*, this Court adopted the following trifold *stare decisis* test for overruling a prior decision of the Ohio Supreme Court:

1. The decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision;

2. The decision defies practical workability; and

3. Abandoning the precedent would not create an undue hardship for those who have relied upon it.

Appellee, Bruce German, respectfully submits that the *Galatis* limitation of this Court's prior decision in *Scott-Pontzer* fails the third prong of the *Galatis stare decisis* test. In this regard, the present case and many other cases before this Court are graphic examples of the undue hardship created by *Galatis*, which precludes any abandonment of *Scott-Pontzer*.

In reliance upon the *Scott-Pontzer* decision, Appellee, Bruce German, retained legal counsel and filed the present civil action against his employer, Therm-O-Disc, Inc., seeking discovery of the motor vehicle liability insurance policies maintained by the employer. In reliance upon the *Scott-Pontzer* decision, the employer and its insurer, Old Republic Insurance Company, retained legal counsel and produced to Mr. German copies of the requested insurance policies. In reliance upon the *Scott-Pontzer* decision, Mr. German sought declaratory judgment in the present action that the Old Republic insurance policies at issue provide un/underinsured motorist coverage for his damages arising from a crash with a drunk driver on January 9, 1997, in which

Mr. German was catastrophically injured. In reliance upon the *Scott-Pontzer* decision, Appellants, Therm-O-Disc, Inc., and Old Republic Insurance Company, conceded in the trial court that Mr. German was an insured under the policies in question, but defended the declaratory judgment action, nonetheless, contending that Mr. German failed to comply with general policy conditions of prompt notice and protection of subrogation/consent to settle. In reliance upon the *Scott-Pontzer* decision, the parties filed cross-motions for summary judgment. In reliance upon the *Scott-Pontzer* decision, the trial court granted summary judgment in favor of Mr. German and denied Appellants, Therm-O-Disc, Inc.'s, and Old Republic Insurance Company's, motion for summary judgment. In reliance upon the *Scott-Pontzer* decision, the trial court convened a four-day jury trial on the issue of damages. In reliance upon the *Scott-Pontzer* decision, the jury returned a verdict in favor of Mr. German and against Old Republic Insurance Company in the amount of $1,490,023.00. In reliance upon the *Scott-Pontzer* decision, the trial court entered final judgment in favor of Old Republic Insurance Company, finding that the un/underinsured motorist coverage provided under the Old Republic policies by operation of law is subject to the same $2 million deductible amount that is attributable to the policies' bodily injury liability coverage.

In reliance upon the *Scott-Pontzer* decision, the parties in the present case filed cross-notices of appeal to the Fifth District Court of Appeals of Ohio. In reliance upon the *Scott-Pontzer* decision, the parties briefed and argued to the court

of appeals their assignments of error. In reliance upon the *Scott-Pontzer* decision, the court of appeals reversed the judgment of the trial court. In reliance upon the *Scott-Pontzer* decision, the court of appeals certified a conflict to this Court. In reliance upon the *Scott-Pontzer* decision, Therm-O-Disc, Inc., and Old Republic Insurance Company filed a notice of discretionary appeal to this Court.

In reliance upon the *Scott-Pontzer* decision, Appellee, Bruce German, has expended approximately $15,000.00, exclusive of attorneys fees, in prosecuting his underinsured motorist claims at issue. Clearly, the parties, the jury, and the lower courts in the present case have expended significant amounts of time, money, and resources in reliance upon the *Scott-Pontzer* decision. It cannot be disputed, therefore, that limiting/overruling *Scott-Pontzer* creates an undue hardship for those who have relied upon it in the present case. It also cannot be disputed that the present case stands as a graphic example of how the Galatis Court's limitation of *Scott-Pontzer* fails the third prong of the *Galatis* trifold *stare decisis* test. Accordingly, *Galatis* was wrongly decided. This Court should, therefore, grant Appellee, Bruce German's, motion for reconsideration, finding that *Galatis* fails the trifold *stare decisis* test adopted by this Court for overruling a prior decision of the Court .

In summary, this Court's reversal of the judgment of the court of appeals in the present case, without first affording Appellee, Bruce German, reasonable notice or an opportunity to be heard, is a substantial and unreasonable denial of Appellee's constitutional right of equal protection and due

process of law. Furthermore, the *Galatis* decision cannot be applied retrospectively to the present certified conflict appeal because Appellee, Bruce German, possesses vested contractual rights under the Old Republic insurance policies at issue. Finally, the parties, the jury, and the lower courts in the present case all relied upon *Scott-Pontzer*, and the *Galatis* limiting/overruling of *Scott-Pontzer* creates an undue hardship in the present case. Accordingly, this Court should grant Appellee, Bruce J. German's, motion for reconsideration, ordering that the certified conflict issues in the present case be fully briefed, argued, and reheard on the merits. In the alternative, this court should order the present appeal dismissed for want of a conflict between the decision of the Richland County Court of Appeals and any valid decision of another Ohio appellate court.

/s/_____

ROBERT W. KERPSACK (0041851)
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215
Telephone: (614) 242-1000
Facsimile: (614) 242-4180

COUNSEL FOR APPELLEE,
BRUCE J. GERMAN

PROOF OF SERVICE

This is to certify that a true copy of the foregoing Motion for Reconsideration of Appellee, Bruce German, of the Decision on the Merits of the Case in the Judgment Entry Filed on November 5, 2003, was served upon **M. Neal Rains**, Counsel for Appellants, Therm-O-Disc, Inc., and Old Republic Insurance Company, FRANTZ WARD LLP, 55 Public Square, 19th Floor, Cleveland, OH 44113-1999, by ordinary U.S. Mail, this _____ day of November, 2003.

/s/_____
ROBERT W. KERPSACK (0041851)
COUNSEL FOR APPELLEE,
BRUCE J. GERMAN

RECONSIDERATION ENTRY

2002-0803 & 2002-0837, Germany. Therm-O-Disc, Inc.
2002-1854, Roberts v. Wausau Business Ins. Co.
2002-1986, Shaw v. State Farm Ins. Co.
2002-2075, Pahler v. Motorists Mut. Ins. Co.
2002-2 123, Kekic v. Royal & SunAlliance Ins. Co.
2002-2 198, Vicars v. MeCray
2002-2214, Greene v. Westfield Ins. Co.
2003-0195 & 2003-0430, Greene v. Westfield Ins. Co.
2003-0258 & 2003-0415, Poulton v. Am. Economy Ins. Co.
2003-0391 & 2003-0535, Wilke v. Montes
2003-0523, Cane v. Stumbo
2003-0524, Wiley v. Grange Mut. Cas. Co.
2003-0532, Pilo v. Liberty Mut. Fire Ins. Co.
2003-0561, Dimalantay. Travelers Ins. Co.
2003-0597, Williams v. Zurich Am. Ins. Co.
2003-0603, Brozovic v. St. Paul Fire & Marine Ins. Co.
2003-0794, Heath v. Fid. & Cas. Co. of New York
2003-0827 & 2003-0867, Akron Gen. Med. Ctr. v. James
2003-0840, Frisch v. CNA Commercial Ins.
2003-0882, Riggs v. Motorists Mut. Ins. Co.
2003-0886, Franklin v. Am. Mfrs. Mut. Ins. Co.
2003-0925 & 2003-1028, Heidt v. Fed. ins. Co.
2003-0938, Wheeler v. W. Res. Mut. Cas. Co.
2003-0957, Lipstreu v. The Hartford
2003-1180, Blake v. Midwestern indemn. Co.
2003-1182, Walker v. Hartford Fire ins. Co.
2003-1240, Dalton v. Lumbermens Mut. Ins. Co.

2003-1277, Radwandky v. Hartford Ins. Co.
2003-133!, Amore v. Grange Ins. Co.
2003-1394, Pratt v. Safe Auto Ins. Co.
2003-1396, Haney v. Motorists Mut. Ins. Co.
2003-1400, Stubbins v. Nationwide Agribusiness Ins. Co.
2003-1433, Westfield Ins. Co. v. Metzler

Upon consideration of the motions for reconsideration in the above cases, IT IS ORDERED by the Court that the motions of DEC 24, 2003 be, and hereby are, denied.

Chief Justice
Thomas J. Myer
A J. Meiigel, Clerk
SUPREME COURT OF OHIO

Westfield Insurance Co.,: Case No. 02-932

v.

James Galatis; et at.

Appellants,

and Aetna Casualty & Surety Co., n.k.a.
Summit County
Travelers,

Appellee.

RECONSIDERATION ENTRY

This cause came on for further consideration upon appellants' motion for reconsideration; the motion for reconsideration of amicus curiae Bruce J. German; and the motion for reconsideration of amicus curiae Ohio Academy of Trial Lawyers. Upon consideration thereof,

IT IS ORDERED by the Court that the motions for reconsideration be, and hereby are, denied.

(Summit County Court of Appeals; No. 20784)

/s/ THOMAS J. MEYER
Chief Justice

RECONSIDERATION ENTRY

242003

MARCIAJ. MENGEL CLERK

SUPREME COURT OF OHIO

2002-1122 & 2002-1459, Alatsis v. Nationwide Ins. Erit.

2002-1245 & 2002-1271, Estate of Houser v. Motorists Ins. Co.

2002-1336, Withem v. Cincinnati Ins. Co.

2002-1925 & 2002-2121, Skala v. Grange Ins. Co.

2002-1989, Addie v. Linville

2002-2066 & 2002-2188, Miller v. Grange Mut. Cas. Co.

2002-2139, Szekeres v. State Farm Fire & Cas. Co.

2002-2 158, Thorne v. Amerisure Ins. Co.

2002-2228, Nationwide Agribusiness Ins. Co. v. Wagner

2003-0074, Knox v. Travelers Ins. Co.

2003-0153, Niese v. Maag

2003-0213, Monroe Guar. Ins. Co. v. Kuba

2003-0232, Warren v. Hanford Ins. Co.

2003-0239, Mlecik v. Farmers Ins. Co.

2003-0301, Westfield Ins. Co. v. Wausau Business Ins. Co.

2003-0353, Bergmeyer v. Auto Owners Ins. Co.

2003-0406, Keegan v. Am. Internatl. Group, Inc.

2003-0427, Gruelich v. The Hartford

2003-0492 & 2003-0493, Rice v. Buckeye State Mut. Ins. Co.

2003-0500, Jones v. Gue

2003-05 10, Mazza v. Am. Continental Ins. Co.

2003-0522, Congrove v. Wausau Ins. Cos.
2003-0525, Brozovic v. St. Paul Fire & Marine Ins. Co.
2003-0729, Sekula v. Hartford Ins. Co.
2003-0778 & 2003-0780, Musser v. Musser
2003-0805, Adams v. Fink
2003-0825, Edgell v. Monroe Guar. Ins, Co.
2003-0844, Taylor v. Universal Underwriters Ins. Co.
2003-0845, Grubb v. Michigan Mut. Ins. Co.
2003-0872 & 2003-0983, Stout v. Travelers Property Cas. Ins. Co.
2003-0896, Wilson v. Haimerl
2003-0923 & 2003-1068, Archer v. Ace, USA
2003-0942, Gates v. Nationwide Ins. Co.
2003-0972, Shanabarger v. Hartford ins. Co.
2003-0981, Frisch v. CNA Commercial Ins.
2003-1065, Kohntopp v. Hamilton Mut. Ins. Co.
2003-1086, Morrison v. Emerson
2003-1090, Sagar v. Nationwide Mut. Fire Ins. Co.
2003-1107, Davis v. Westfield Cos.
2003-1114, Reppl v. Jones
2003-1122 & 2003-1159, Universal Underwriters Ins. Co. v. Estate of Miller
2003-1181, Landers v. Lucent Technologies, Inc.
2003-1183, Rosenberry v. Morris
2003-1205, Delong v. Myers
2003-1250, Hughes v. Nationwide Mut. Ins. Co.
2003-1254, Hartfield v. Toys "R" Us
2003-1268, Jones v. Morehart
2003-1271, Hans v. Hanford Ins. Co.

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2003-1327, Rucker v. Davis
2003-1328, Rucker v. Davis
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2003-1375, Westfield Ins. Co. v. Metzler
2003-1384 & 2003-1714, Cincinnati Ins. Co. v. Lang
2003-1470 & 2003-1471, Hoop v. Nationwide Mut. Fire Ins. Co.
2003-1477, Cincinnati ins. Co. v. Perkins

Upon consideration of the amicus curiae motions for reconsideration of Bruce German in the above cases,

IT IS ORDERED by the Court that the motions for reconsideration be, and hereby are, denied.

Chief Justice
/s/ THOMAS J. MEYER

(2)

Supreme Court, U.S.
FILED
APR 28 2004
OFFICE OF THE CLERK

No. 03-1364

IN THE

Supreme Court of the United States

BRUCE J. GERMAN,

Petitioner,

v.

THERM-O-DISC, INC. and
OLD REPUBLIC INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

M. NEAL RAINS
Counsel of Record
TRAVIS F. JACKSON
FRANTZ WARD LLP
55 Public Square
19th Floor
Cleveland, Ohio 44113
(216) 515-1660

Counsel for Respondents

187158

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in the absence of any substantive or procedural due process violations, this Court should wade into the abyss that the Supreme Court of Ohio created with its infamous decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 710 N.E.2d 1116 (Ohio 1999).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Therm-O-Disc, Inc. is a wholly-owned subsidiary of Emerson Electric Co., a publicly traded company.

Respondent Old Republic Insurance Company is a wholly-owned subsidiary of Old Republic International Corporation, a publicly traded company.

INTRODUCTION

Respondents Therm-O-Disc, Inc. ("Therm-O-Disc"), and Old Republic Insurance Company ("Old Republic") respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Supreme Court of Ohio's decision in this matter. As discussed below, the Supreme Court of Ohio did not violate Petitioner's right to substantive or procedural due process when it reversed the decision of Ohio's Court of Appeals for the Fifth District on the authority of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256 (Ohio 2003). Rather, the actions of the Supreme Court of Ohio merely recognize the constitutionally sound principle that its decisions have retroactive effect.

STATEMENT OF THE CASE

This case is one of the numerous cases for uninsured/ underinsured motorist ("UM/UIM") coverage that flooded Ohio courts following the Supreme Court of Ohio's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 710 N.E.2d 1116 (Ohio 1999). Petitioner's Statement of the Case omits or understates four facts material to this Court's consideration of the issues. First, Petitioner was not a party to the insurance contracts entered into by and between Emerson Electric Co. and Old Republic that were at issue in this matter. Second, Petitioner was not within the course and scope of his employment when he was injured on January 9, 1997. Third, neither Therm-O-Disc nor Old Republic ever conceded in the courts below that *Scott-Pontzer* was properly decided. Finally, no court, at any time in the nearly four-year history of this case, entered judgment in Petitioner's favor.

REASONS FOR DENYING THE PETITION

Neither substantive nor procedural due process dictates that Petitioner is immune from the retroactive application of decisions issued by the Supreme Court of Ohio. In interpreting the insurance contracts at issue in this case, the Supreme Court of Ohio relied on *Galatis* to find that Petitioner was not an insured for purposes of UM/UIM coverage. This determination reflects the well-settled principle that decisions of the Supreme Court of Ohio have retroactive effect. In the absence of any substantive or procedural due process violations, this Court should deny Petitioner's request for a Writ of Certiorari.

I. No Vested Rights Exist to Support the Alleged Violation of Petitioner's Right to Substantive Due Process.

The Supreme Court of Ohio did not violate Petitioner's right to substantive due process by relying on *Galatis* to reverse the decision of Ohio's Court of Appeals for the Fifth District. Petitioner claims that, in disregard of his right to substantive due process, the Supreme Court of Ohio extinguished his property interests in a cause of action that arose under *Scott-Pontzer*. [Pet., at p. 8]. Petitioner's argument assumes that he had vested property rights in such cause of action, and then presupposes the substantive protections of the due process clause apply to those rights. Petitioner is wrong on both counts.

First, the property rights that Petitioner claims in his cause of action never vested. No court entered a final unreviewable judgment in Petitioner's favor. *See, e.g., Lyon v. Agusta, S.P.A.*, 252 F.3d 1078 (9th Cir. 2001) (holding property rights in a cause of action do not vest until a final unreviewable judgment has been obtained). Second, as Justice Powell has noted, "Even if one assumes the existence of a property right . . . not every such right is entitled to the protection of substantive due process."

Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, at 229 (POWELL, concurring). Instead, substantive due process applies only to constitutionally created rights, not to state-created property rights. *Id.*; *see also Wooten v. Campbell*, 49 F.3d 696 (11th Cir. 1995); *Nilson v. Layton City*, 45 F.3d 369 (10th Cir. 1995); and *Greenbriar Village, LLC v. Mountain Brook City*, 345 F.3d 1258, 1262 (11th Cir. 2003). Without any vested rights worthy of substantive due process protection, the Supreme Court of Ohio did not transgress any of Petitioner's constitutional rights when it reversed the decision of the Court of Appeals for the Fifth District on the authority of *Galatis*.

II. Procedural Due Process Does Not Require that Petitioner Be Immune from the Retroactive Application of Decisions Issued by the Supreme Court of Ohio.

Nothing in the federal Constitution prohibits the retroactive effect of a judicial decision. Yet Petitioner argues that his reliance on *Scott-Pontzer* in light of procedural due process, as explained in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), protects him against the retroactive application of *Galatis*. [Pet., at p. 10-11]. This Court, however, has largely abandoned *Chevron Oil*, and has expressly held that reliance interests are insufficient to thwart the retroactive application of a judicial decision. *See, e.g., Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993).

In *Harper*, the Supreme Court of Virginia had used *Chevron Oil* to deny retroactive effect to this Court's interpretation of federal law. This Court disagreed with the Supreme Court of Virginia's reliance on *Chevron Oil* by explaining:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct

> review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*'s ban against "selective application of new rules." 479 U.S. at 323. Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, id., at 322, we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule. *Beam*, supra, at 543 (opinion of SOUTER, J.). Our approach to retroactivity heeds the admonition that "the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *American Trucking*, supra, at 214 (STEVENS, J., dissenting) (Emphasis added).

509 U.S. at 97.

Two years later, in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 115 S. Ct. 1745 (1995), this Court used *Harper* to reverse the Supreme Court of Ohio's refusal to give retroactive application to *Bendix Autolite Corp. v. Enterprises, Inc.*, 486 U.S. 888 (1988). *Bendix* held that an Ohio tolling provision for statutes of limitations for non-Ohio residents was unconstitutional. In reversing the Supreme Court of Ohio, this Court stated:

> The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she and others like her,

> may have reasonably relied upon pre-*Bendix* law – a reliance of the same kind and degree as that involved in *Chevron Oil*. But this type of justification – often present when prior law is overruled – is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first announced it).

514 U.S. at 759. *See also Ryder v. United States* (1995), 515 U.S. 177, 184-85, 132 L. Ed. 2d 136 (questioning whether *Chevron Oil* has any "continuing validity" after *Harper* and *Hyde*). Because reliance is insufficient to establish a procedural due process violation, this Court should deny Petitioner's request for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

M. NEAL RAINS
Counsel of Record
TRAVIS F. JACKSON
FRANTZ WARD LLP
55 Public Square
19th Floor
Cleveland, Ohio 44113
(216) 515-1660

Counsel for Respondents

(3)

Nº. 03-1364

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MAY 7 -
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In The Supreme Court of the United States

BRUCE J. GERMAN,
Petitioner,

v.

THERM-O-DISC, INC., AND OLD REPUBLIC INSURANCE COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State of Ohio

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

*ROBERT W. KERPSACK
ROBERT W. KERPSACK CO., LPA
21 East State Street, Suite 300
Columbus, OH 43215

614-242-1000

Attorney for Petitioner
**Counsel of Record*

May , 2004

LEGAL ADVANTAGE • 432 Walnut Street • Cincinnati, OH 45202
(800) 581-2252

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INTRODUCTION

Pursuant to Rule 15-6 of the Rules of the Supreme Court of the United States, Petitioner Bruce J. German (hereinafter "German") submits this Reply Brief in response to the Brief in Opposition of Respondents Therm-O-Disc, Inc., and Old Republic Insurance Company. Respondents' Brief in Opposition demonstrates why German's Petition for a Writ of Certiorari should be granted. In direct violation of Section One of the Fourteenth Amendment to the United States Constitution, German and other citizens similarly situated to him are victims of a political process that has thwarted the stability and predictability of the civil justice system in this country.

STATEMENT OF THE CASE

Petitioner Bruce J. German respectfully submits that Respondents cite and misstate four material facts in their Statement Of The Case. First, Respondents erroneously state that German was not a party to the insurance contracts at issue. In fact, German was not a "named insured;" however, the trial court and the court of appeals expressly found that German was an "insured" pursuant to the express terms of the policies. Throughout the state court proceedings, Respondents never argued or appealed the issue that German was *not* an insured under the policies.

Secondly, Respondents note that German was not acting in the course and scope of his employment at the time of the motor vehicle collision giving rise to his underinsured motorist claims in question. The trial court and the court of appeals expressly found, however, that German was an insured under the insurance policies at issue, regardless of he was acting in the course and scope of his employment. Contrary to Respondents' assertions, this issue was neither raised nor preserved on appeal to the Ohio Supreme Court.

Thirdly, Respondents allege that they never conceded the validity of the Ohio Supreme Court's decision in Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St. 3d 660(1999), 710 N.E.2d 1116. Throughout the state court proceedings, however, Respondents never argued or appealed the issue that Scott-Pontzer was wrongly decided.

Finally, Respondents erroneously allege that no court ever entered judgment in favor of German on his underinsured motorist claim in question. In fact, the state trial court entered summary judgment in favor of German on his underinsured motorist claim and ordered the matter to proceed to trial on the factual issue of the value of German's claim. After the jury returned a verdict in favor of German in the amount of $1,490,023.00, the trial court entered final judgment in favor Respondents, finding that

the Old Republic policies at issue provided underinsured motorist coverage with a deductible amount of $2 million. Of course, the state court of appeals reversed the court's judgment on this issue, and this is the only issue that Respondents preserved on appeal to the Ohio Supreme Court.

REASONS FOR GRANTING THE PETITION

Respondents assert that it is a well-settled principle of Ohio law that decisions of the Supreme Court of Ohio have retroactive effect. Respondent fails to note, however, that Ohio has adopted two general exceptions to its retroactivity doctrine: 1) Where contractual rights have arisen under a prior decision; or 2) Where vested rights have been acquired under the prior decision. See Peerless Elec. Co. v. Bowers,164 Ohio St. 209(1955), 210, 129 N.E.2d 467. In opposing the present petition, Respondents argue only that German's possesses no "vested" rights for which he was entitled to procedural or substantive due process. German respectfully submits, however, that he possesses "acquired" rights under the Ohio Supreme Court's prior Scott-Pontzer decision, which fall squarely within the first exception to the Peerless doctrine.

In Scott-Pontzer, the Ohio Supreme Court interpreted the identical insurance policy form that is at issue in the present case. This standard Business Auto Coverage form was widely used throughout the commercial insurance industry during the 1990's. Prior to the Scott-Pontzer decision, no Ohio court had ever interpreted this Business Auto Coverage Form to provide un/underinsured motorist coverage by operation of the Ohio Uninsured Motorist Statute to employees like German, who were injured in motor vehicle collisions

occurring outside the scope of employment. Pursuant to the Scott-Pontzer holding, employees like German were held to be insureds under the un/underinsured motorist coverage provided by their employers' commercial insurance policies, regardless of whether the motor vehicle collision in which they were involved occurred in the scope of employment. Following the Scott-Pontzer decision, un/underinsured motorist claims like German's were widely referred to as "Scott-Pontzer claims." Pursuant to Scott-Pontzer, employees like German acquired a common law right of action to recover un/underinsured motorist benefits for injuries and damages arising from motor vehicle collisions occurring outside the course of employment.

In opposing the present petition, Respondents argue erroneously that the Ohio Supreme Court acted appropriately in treating German's underinsured motorist claim differently from the Scott-Pontzer claimant's underinsured motorist claim. However, German is presenting an underinsured motorist claim under the exact same circumstances that were present in Scott-Pontzer. The Ohio Supreme Court held the Scott-Pontzer claimant to be an insured under the exact same Business Auto Coverage Form at issue in the present case. In fact, prior to Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, many Ohio and federal courts held un/underinsured motorist claimants identically situated to

German to be insureds under the Business Auto Coverage Form at issue in the present case. As a matter of federal constitutional law, therefore, German is entitled to equal protection of the Scott-Pontzer decision, which created a common law right of action to recover un/underinsured motorist coverage under the circumstances at issue in the present case. U.S. Const. amend. XIV.

German's substantive property right to un/underinsured motorist coverage benefits, pursuant to Scott-Pontzer, conflicts with the subsequent decision of the Ohio Supreme Court in Galatis, which requires that an employee be injured in the scope and course of employment in order to be insured under the un/underinsured motorist coverage of a corporate employer's business automobile insurance policies. Regardless of whether Scott-Pontzer or Galatis was rightly or wrongly decided, the Ohio Supreme Court summarily extinguished German's underinsured motorist claims by applying Galatis to the present case, in violation of German's federal constitutional rights. Accordingly, this Court should grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

By failing to address the issue in their Brief in Opposition, Respondents apparently concede that the Ohio Supreme Court's summary reversal of the present case,

without a hearing or notice to German, serves as an example of how the politics of judicial elections can, if left unchecked, adversely affect the substantive common law. By enacting the due process and equal protection clauses, however, the drafters of the federal Constitution sought to ensure that political elections could never adversely affect our substantive common law. Even though the present case was not an appropriate procedural vehicle for the retroactive application of Galatis, the Ohio Supreme Court, pursuant to a 4-3 vote, summarily reversed the Court of Appeals judgment in the instant action, without ever notifying German that his rights were before the Court, either in the present case or in Galatis. Allowed to stand, the erroneous actions of the Ohio Supreme Court in the present case shall serve as a dangerous precedent that the federal constitution provides no protection against the bending of our substantive common law at the will of politics. In order to preserve the stability and predictability of our justice system, this Court must grant German's Petition for a Writ of Certiorari and review the judgments of the Supreme Court of Ohio in the present case.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of the State of Ohio should be granted.

Respectfully submitted.

ROBERT W. KERPSACK CO., LPA

Robert W. Kerpsack (MN)
ROBERT W. KERPSACK
Attorney for Petitioner, Bruce J. German
21 East State Street, Suite 300
Columbus, OH 43215
Telephone: (614) 242-1000